Indiana Law Review

VOLUME 14 • 1981 • NUMBER 3

Articles

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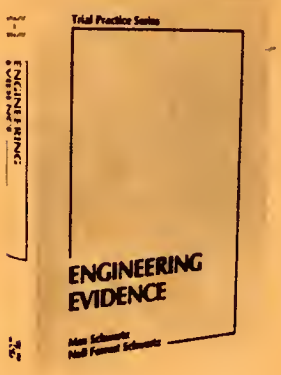

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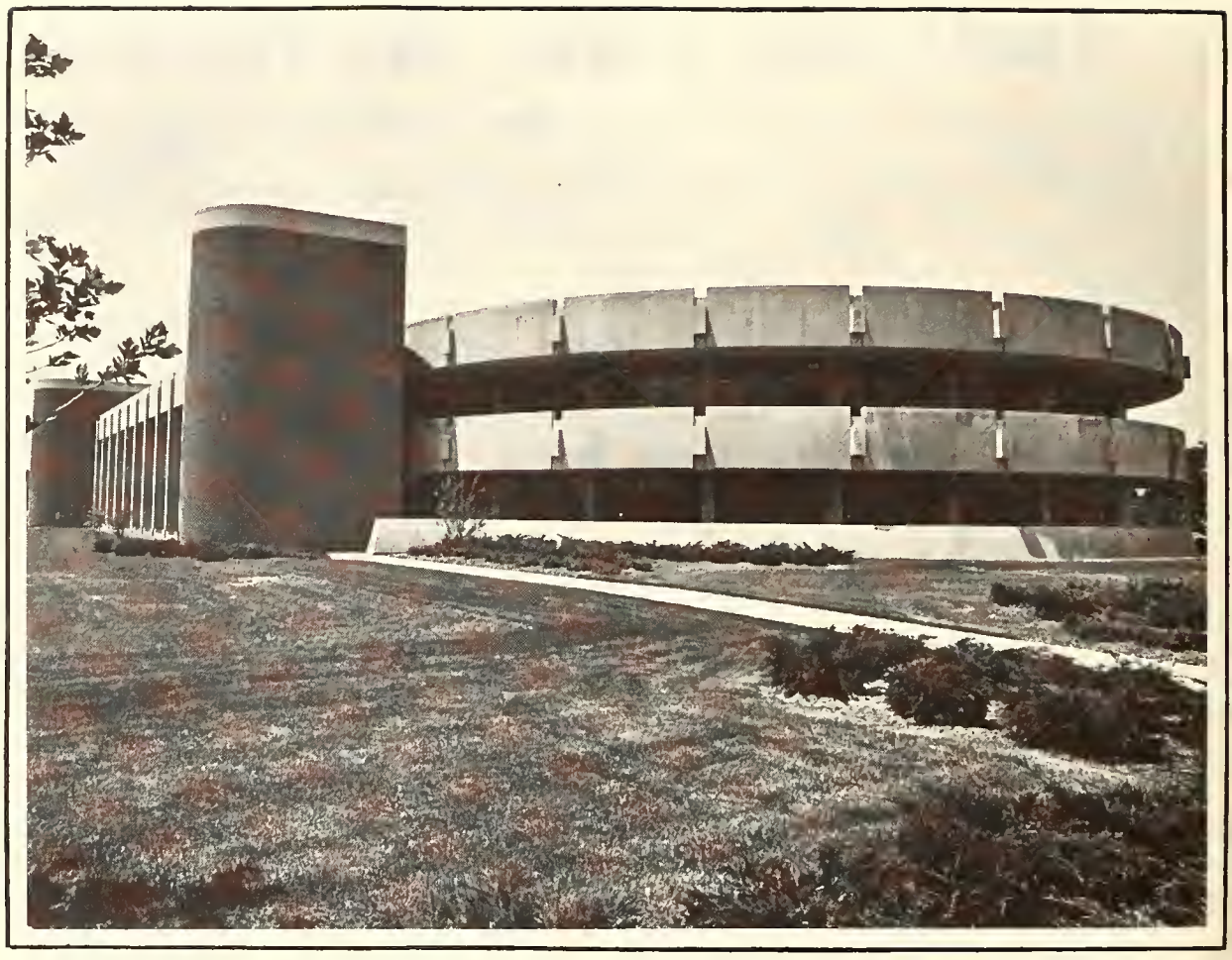
The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published four times yearly, January, March, April, and June, by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefor. Subscription rates: one year, $15.00; foreign $18.50. Single copies: annual Survey issue, $9.00; other issues, $4.50. Back issues, volume 1 through volume 11, are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80123. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.



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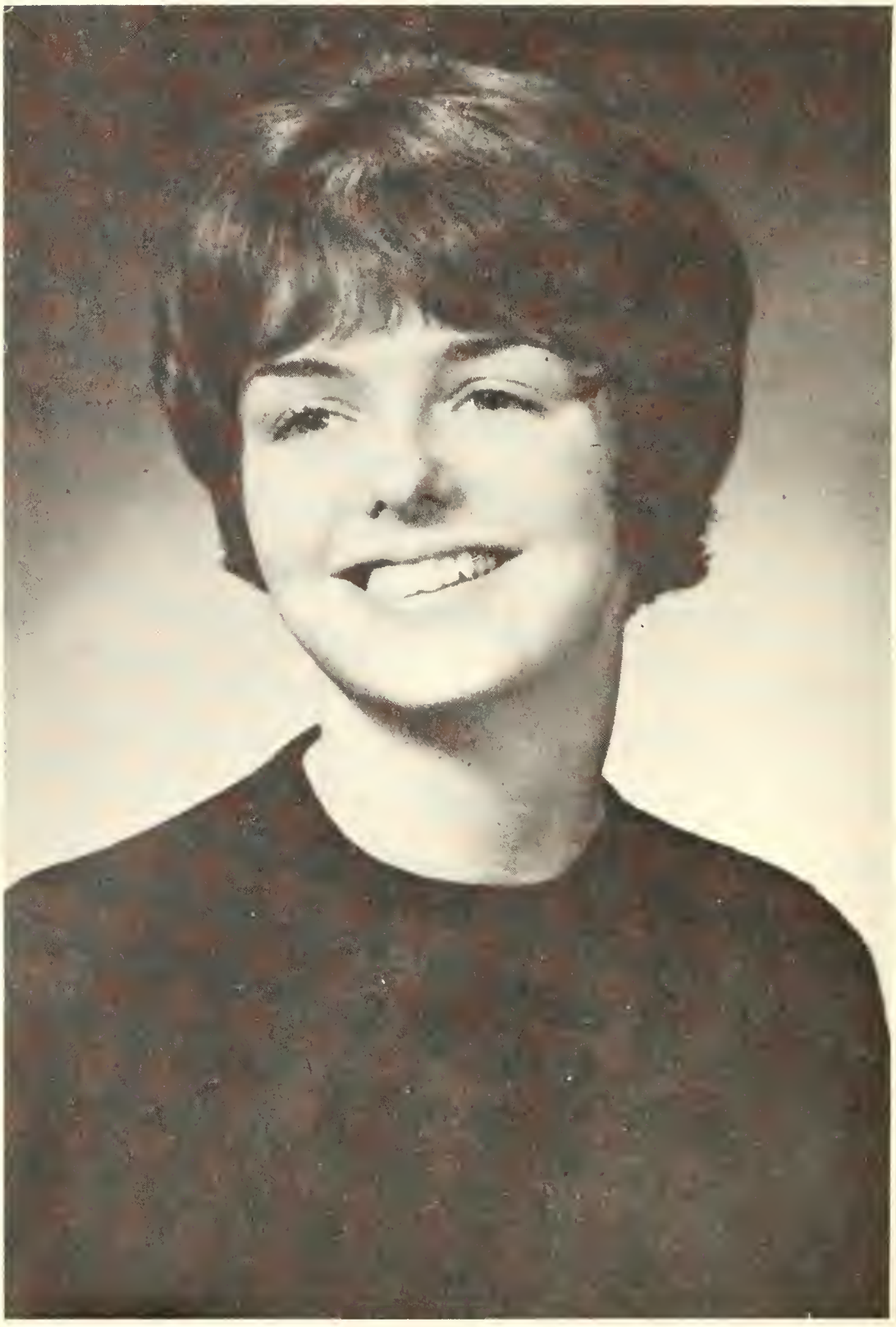

LORNA R. POWERS

This issue of the Indiana Law Review is dedicated with enduring admiration and affection to the memory of a friend and colleague, Lorna R. Powers.

Indiana Law Review

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The NLRB in Search of a Standard: When Is the Discharge of a Supervisor in Connection With Employees' Union or Other Protected Activities an Unfair Labor Practice?

GAIL FROMMER BROD*

I. INTRODUCTION

In 1947, Congress enacted the Taft-Hartley amendments[1] to the National Labor Relations Act[2] which, *inter alia*, excluded supervisors from the statute's protective ambit afforded to employees who engage in union or other protected concerted activities.[3] As the United

*B.S., 1970, New York State School of Industrial and Labor Relations, Cornell University; J.D., 1973, U.C.L.A. School of Law; Associate Professor of Law, Whittier College School of Law. The author is grateful to Professor Benjamin Aaron of the U.C.L.A. School of Law and Professor Thomas A. Diamond of the Whittier College School of Law for their advice on the preparation of this Article. The author thanks Lindy Carll, a student at the Whittier College School of Law, for her assistance.

[1]Labor Management Relations Act (Taft-Hartley Act), 1947, Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947) (codified at 29 U.S.C. § 151 (1976)) [hereinafter cited as the "Act"].

[2]National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. § 160 (1976)).

[3]Prior to 1947, the Board interpreted the term "employee" to include supervisors. NLRB v. North Arkansas Electric Co-op Inc., 446 F.2d 602, 605 (8th Cir. 1971). The 1947 Act amended the National Labor Relations Act of 1935 to exclude "any individual employed as a supervisor" from the definition of the term "employee." 29 U.S.C. § 152(3) (1976). Consequently, supervisors are not covered by §§ 7 and 8(a)(1) of the Act, 29 U.S.C. §§ 157 and 158(a)(1) (1976), which protect *employees* from employer interference, restraint, or coercion because they have engaged in protected activities. Section 7 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities . . . .

Section 8 of the Act provides in part:

> (a) It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

29 U.S.C. § 158 (1976).

The Taft-Hartley Act made other changes in the National Labor Relations Act

States Supreme Court has noted, the amendments "freed employers to discharge supervisors without violating the Act's restraints against discharges on account of labor union membership."[4] Yet, the National Labor Relations Board (hereinafter referred to as the "Board") has held in a number of cases that an employer's discharge of a supervisor, in connection with rank-and-file employees' union or other protected concerted activities, violated section 8(a)(1) of the Act.[5] The effect of many of these decisions is to require an employer to reinstate (with back pay) a discharged supervisor whose activities were antagonistic to the interests of higher management. For example, in *Production Stamping, Inc.*[6] the Board found that the respondent-employer had violated section 8(a)(1) by discharging a supervisor who was one of the three principal organizers of a union among the rank-and-file. The Board ordered that the supervisor be reinstated with back pay plus interest and that the employer restore to him all rights and privileges of employment. In cases like this, the Board

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with respect to supervisors. *See* § 2(11) of the Act, 29 U.S.C. § 152(11) (1976), which defines "supervisor," and § 14(a) of the Act which provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164 (1976).

[4]Beasley v. Food Fair, Inc., 416 U.S., 653, 654-55 (1974) (§ 14(a) of the Act barred enforcement of a state law providing for damages as a remedy for the discharge of a supervisor for union membership).

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976) states that it is an unfair labor practice for an employer to discriminate in "any term or condition of employment to encourage or discourage membership in any labor organization . . . ." This provision protects employees, not supervisors, from discharge because they have engaged in union activities. *See, e.g.*, Fairview Nursing Home, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973), *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

[5]*E.g.*, Empire Gas Co., 254 N.L.R.B. No. 76 (Jan. 14, 1981); G & M Lath and Plaster Co., 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); DRW Corp., 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980); Nevis Industries Inc., 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979); Downslope Industries, Inc., 246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979); Budget Marketing, Inc., 241 N.L.R.B. 1108, 101 L.R.R.M. 1068 (1979); Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); East Belden Corp., 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978); Donelson Packing Co., 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced* 569 F.2d 430 (6th Cir. 1978); VADA of Oklahoma, Inc., 216 N.L.R.B. 750, 88 L.R.R.M. 1631 (1975); Fairview Nursing Home, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973), *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974); Krebs & King Toyota, Inc., 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972); Pioneer Drilling Co., 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

[6]239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).

has reasoned that the employer's discharge of a supervisor is unlawful because the employer's conduct interfered with, restrained, or coerced nonsupervisory employees in the exercise of the rights guaranteed them by section 7 of the Act. Generally, the Board finds the employer's action to be violative of section 8(a)(1) because it was an integral part of a pattern of misconduct aimed at penalizing employees for engaging in union or other protected concerted activities.

This Article will explore, analyze, and finally, criticize the Board's development of the concept that it is an unfair labor practice to discharge a supervisor in order to discourage union or other protected activities by employees. It appears that in its zeal to protect the rights of nonsupervisory employees, the Board has failed to focus on the congressional determination that an employer must be free to discharge and discipline supervisors in furtherance of its legitimate interest in opposing unionization by lawful means. Moreover, the Board has failed to develop a standard for resolving these cases which emphasizes factors that are germane to the question of whether the discharge of a supervisor *in fact* tends to interfere with, restrain, or coerce employees in the exercise of their statutory rights, which promotes the fair and efficient administration of the Act, and which takes into account the realities of life in the workplace.

II. The Development of Board Policy

Relatively soon after the Taft-Hartley Act was adopted by Congress, the Board recognized that there were instances in which the discharge or discipline of a supervisor would constitute an unfair labor practice although supervisors were excluded from the Act. Over the years, the Board rendered a series of decisions which established that an employer runs afoul of section 8(a)(1) by discharging or disciplining a supervisor under certain circumstances: because he or she refused to commit unfair labor practices;[7] because

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[7]*See, e.g.*, American Feather Products, 248 N.L.R.B. 1102, 104 L.R.R.M. 1185 (1980) (demotion and termination of supervisor for her refusal to unlawfully interrogate employees (her daughters) about union activities violated § 8(a)(1)); Belcher Towing Co., 238 N.L.R.B. 446, 99 L.R.R.M. 1566 (1978), *enforced in material part*, 614 F.2d 88 (5th Cir. 1980) (§ 8(a)(1) violated by discharge of supervisor who refused to engage in unlawful surveillance of his crew's union activities); Gerry's Cash Markets, Inc., 238 N.L.R.B. 1141, 99 L.R.R.M. 1617 (1978), *enforced*, 602 F.2d 1021 (1st Cir. 1979) (employer violated § 8(a)(1) by demoting supervisor because he had failed to enforce invalid no-solicitation rule aimed at stopping conversation relating to union activity); Russell Stover Candies, Inc., 223 N.L.R.B. 592, 92 L.R.R.M. 1240 (1976), *enforced*, 551 F.2d 204 (8th Cir. 1977) (discharge of supervisor for refusing to continue unlawful

the supervisor refused to silently acquiesce in the employer's plan to engage in unfair labor practices;[8] or because the supervisor participated in Board proceedings[9] or in contractually-required grievance or arbitration proceedings.[10]

To be distinguished from these kinds of cases are *Pioneer Drilling* and its progeny discussed below, decisions in which the Board has held it to be an unfair labor practice for an employer to discharge a supervisor in furtherance of its efforts to thwart a union organization drive among its rank-and-file workers or similarly protected concerted activities by employees.[11] For, unlike the earlier kinds of cases, in *Pioneer Drilling* and succeeding decisions, the discharged supervisor often was actively involved in a unionization drive among employees or in similar activities not in higher management's best interests. In these circumstances, the effect of the Board's finding that the supervisor's discharge was unlawful was to compel an employer to reinstate, with back pay, a supervisor who was disloyal in management's eyes. Thus, the policy issues to be addressed here are distinguishable from those of the earlier decisions where the Board first developed the concept that the discharge of a supervisor could violate section 8(a)(1).[12]

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surveillance of employees' union activities violated § 8(a)(1)); Talladega Cotton Factory, Inc., 106 N.L.R.B. 295, 32 L.R.R.M. 1497 (1953), *enforced*, 213 F.2d 209, 215-17 (5th Cir. 1954) (employer's discharge of supervisors, who had reluctantly committed unfair labor practice, for failure to halt unionization violated § 8(a)(1)).

[8]*See, e.g.*, Buddies Super Market, 223 N.L.R.B. 950, 92 L.R.R.M. 1008 (1976), *enforcement denied*, 550 F.2d 39 (5th Cir. 1977) (Board panel held that discharge of a supervisor for exposing employer's scheme to unlawfully fire an employee because of his union affiliation violated § 8(a)(1)).

[9]*See, e.g.*, Oil City Brass Works, 147 N.L.R.B. 627, 56 L.R.R.M. 1262 (1964), *enforced*, 357 F.2d 466 (5th Cir. 1966) (employer's refusal to recall a supervisor from layoff because supervisor had testified adversely to employer at Board hearing violated § 8(a)(1)); Better Monkey Grip Co., 115 N.L.R.B. 1170, 38 L.R.R.M. 1025 (1956), *enforced* 243 F.2d 836 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957) (employer violated § 8(a)(1) by discharging supervisor because he gave testimony adverse to employer's interests at Board hearing).

[10]*See, e.g.*, Illinois Fruit & Produce Corp., 226 N.L.R.B. 137, 93 L.R.R.M. 1224 (1976) (discharge of supervisor for giving truthful testimony adverse to employer at arbitration hearing violated § 8(a)(1)); Rohr Industries, Inc., 220 N.L.R.B. 1029, 90 L.R.R.M. 1541 (1975) (§ 8(a)(1) violated by supervisor's layoff because he had provided union representative with a signed statement supportive of grievant's position in arbitration).

[11]*See* cases cited note 5 *supra*.

[12]One may not assume that Congress withdrew supervisors from the Act in order to permit employers to compel supervisors to commit unfair labor practices or to acquiesce in their commission. Nor may one assume that Congress excluded supervisors so as to allow employers to stand as obstacles to the Board's or an arbitrator's fact-finding function in vindication of employee rights under the statute or pursuant to a collective bargaining agreement. Thus, there may be no conflict between the congres-

Pioneer Drilling[13] is seen as the genesis of that line of cases where the Board evolved the concept that a supervisor's discharge in connection with reprisals against employees' union or other protected concerted activities may violate section 8(a)(1).[14] However, the case may be no more than a logical extension to a unique factual setting of the earlier rule that an employer may not coerce a supervisor into committing unfair labor practices. Indeed, the unusual facts of *Pioneer Drilling* set that decision apart from its progeny and make the Board's reliance on its authority in subsequent decisions questionable.

The litigation in *Pioneer Drilling* arose because of a drilling industry practice which dictated that when a supervisor's employment is terminated, the employment of the rank-and-file workers he supervises also terminates. The employer discharged two supervisors to effect the illegal termination of their crews where union organizational activity was centered. The action taken against supervisors was not based on their own pro-union activity (although both had signed union authorization cards) but was designed to rid the company of the pro-union employees. The supervisors' discharges were found to violate section 8(a)(1) because they were "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."[15]

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sional determination to exclude supervisors from the Act's ambit and the Board's decisions that it is unlawful to fire a supervisor because he refused to commit or opposed unfair labor practices, or because he participated in contractual grievance or arbitration proceedings or in Board proceedings. However, Congress did exclude supervisors from the Act so that an employer could discipline and discharge supervisory personnel and thereby insure their undivided loyalty. *See* text accompanying notes 52-57 *infra*. Thus, one may find a conflict between congressional intent and the outcome of cases like Pioneer Drilling, 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968) and its progeny in which employers were compelled to reinstate supervisors who had assisted employees in establishing a union or who had engaged in other activities adverse to higher management's interests.

[13]162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

[14]In a case prior to *Pioneer Drilling*, Heck's Inc., 156 N.L.R.B. 760, 764-65, 61 L.R.R.M. 1128, 1133 *enforced in part*, 386 F.2d 317 (4th Cir. 1967), a Board panel rejected the contention that the discharge of two supervisors violated § 8(a)(1) because it was not shown "that their discharge was motivated other than by a purpose to discourage their union activities as supervisors. . . ." Although this opinion presages the policy to be enunciated by the Board in subsequent supervisor discharge cases, decisions after *Pioneer Drilling* seem to treat that case, and not *Heck's Inc.*, as significant in the history of Board policy. *See, e.g.*, former Member Truesdale's statement in DRW Corp., 248 N.L.R.B. 828, 93 L.R.R.M. 1506 (1980) that *Pioneer Drilling* is the first in the line of supervisor discharge cases.

[15]162 N.L.R.B. at 923, 64 L.R.R.M. at 1126. The "integral part of a pattern of conduct" language was quoted from Miami Coca Cola Bottling Co., 140 N.L.R.B. 1359, 1361,

The "integral part of a pattern of conduct" rationale of *Pioneer Drilling* might have been applied only to those peculiar cases in which the discharge of a supervisor is the vehicle for unlawful acts committed directly against employees protected by the Act (*e.g.*, where the discharge of a supervisor is the means by which the employer unlawfully discharges nonsupervisory employees). However, the Board did not so limit the application of this rationale.

In 1972, in *Krebs & King Toyota, Inc.*,[16] a Board panel[17] applied the reasoning of *Pioneer Drilling* to a case where the supervisor's discharge was not the means by which the employer effected the unlawful termination of protected employees.[18] However, the Board characterized the facts in *Krebs & King Toyota* to suggest that *Pioneer Drilling* was squarely applicable[19] and found that the

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52 L.R.R.M. 1242 (1963), *enforced*, 213 F.2d 208 (5th Cir. 1954) in which the Board held unlawful a supervisor's discharge for failing to cooperate in the employer's unlawful plan to discharge union adherents and replace them with new employees.

[16]197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972).

[17]The panel consisted of Board Members Jenkins, Kennedy and Penello. Member Kennedy dissented from the holding that the discharges of the supervisors violated § 8(a)(1). Krebs & King Toyota, Inc., 197 N.L.R.B. 462, 464-65, 80 L.R.R.M. 1570, 1573 (1972).

[18]In *Krebs & King Toyota*, *id.*, the employer sold cars, operated a service and parts department, and maintained a body shop which employed Supervisor Gallenz and two nonsupervisory employees. When the employees of all departments went on strike, the employer subcontracted its body repair work. During the strike, Supervisor Gallenz, who was pro-union, spoke for striking employees. When the strike was settled and the strikers returned to work, the body shop remained closed and the employer continued to subcontract that work. Contrary to the trial examiner's conclusion, the Board panel held that the employer's subcontracting of the body shop work and its refusal to re-employ the two body shop employees was unlawfully motivated by a desire to discourage union activities and therefore violated §§ 8(a)(1) and 8(a)(3) of the Act. *Id.* at 462-63, 80 L.R.R.M. at 1571-72. Citing *Pioneer Drilling*, a majority of the Board panel further held that the termination of Supervisor Gallenz violated § 8(a)(1). *Id.* at 463 n.4, 80 L.R.R.M. at 1573.

[19]The Board panel created the impression that the facts of *Krebs & King Toyota* were similar to *Pioneer Drilling* (where the supervisors' discharges effected the illegal discharges of pro-union employees) by describing the supervisor's discharge as "effectuating" the employer's discriminatory decision to subcontract the body shop work and not recall employees. *Id.* at 463 n.4, 80 L.R.R.M. at 1572-73. Moreover, the Board panel suggested that the termination of the supervisor and the illegal termination of the employees were related as in *Pioneer Drilling* by noting the employer's understanding that the employees would not return to work without the body shop supervisor. *Id.* at 462 n.2., 80 L.R.R.M. at 1572. The inference to be drawn is that this case is like *Pioneer Drilling* where the employer's termination of a supervisor caused the termination of nonsupervisory employees protected by the Act.

It is debatable how closely the facts in *Krebs & King Toyota* resemble *Pioneer Drilling*. In the former case, the termination of the body shop supervisor may have been seen by the employer as a necessary step in effecting the illegal termination of the body shop employees. The employer subcontracted the body shop work as a

discharge of the supervisor violated section 8(a)(1) as "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."[20]

In *Fairview Nursing Home*,[21] a Board panel[22] broke new ground when a majority of the three-member panel held that it was unlawful for the employer to discharge two supervisors (as well as more than forty rank-and-file employees) in an effort to rid itself of all union adherents.[23] While in *Pioneer Drilling* and in *Krebs & King Toyota* there was, or appeared to be, a causal link between the discharge of the supervisor and the unlawful termination of employees engaged in union activities, in *Fairview Nursing Home* there was no such causal relationship between the discharges of the two supervisors and the unfair labor practices committed directly against the employees.[24] The decision of the administrative law judge, which was adopted by the majority with some modification,[25]

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subterfuge to rid itself of the pro-union employees, the Board panel held. *Id.* at 462-63, 80 L.R.R.M. at 1572-73. To paint a convincing picture that the closing of the body shop was an economic necessity, the employer may have thought it had to lay off all individuals employed in the body shop, including the supervisor. In this sense, then, the termination of the supervisor was a significant step in effecting the termination of rank-and-file employees.

On the other hand, unlike *Pioneer Drilling*, the discharge of the supervisor was not inseparable from the illegal termination of the pro-union employees. The employer could have retained the supervisor in its employ while illegally terminating the body shop employees. Analyzed as separable acts, the discriminatory refusal to recall the employees would be illegal, but the failure to recall the supervisor might be viewed as a legal exercise of the employer's prerogative to fire a supervisor because he engaged in union activities. The Mousetrap of Miami, Inc., 174 N.L.R.B. 1060, 70 L.R.R.M. 1429 (1969) (it is not unlawful for an employer to fire a supervisor because he had engaged in union activities). It should be noted that the Board panel never addressed whether the employer's termination of Supervisor Gallenz was motivated by hostility to the supervisor's active participation in union activities.

[20]197 N.L.R.B. at 463 n.4, 80 L.R.R.M. at 1573.

[21]202 N.L.R.B. 318, 82 L.R.R.M. 1566, *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

[22]The panel consisted of Members Jenkins, Kennedy and Penello. Member Kennedy dissented from the majority's holding that the discharges of two supervisors violated § 8(a)(1). *Id.* at 318 n.2, 82 L.R.R.M. at 1566.

[23]*Id.*

[24]The discharges of the two supervisors neither affected nor effectuated the unlawful discharges of more than forty employees in violation of §§ 8(a)(1) and 8(a)(3) of the Act. The employer's owner simply discharged at one time all individuals (including two supervisors) who had signed union authorization cards. Although the employer's owner drew no distinction between employees and supervisors when she discharged them as a group, the Board might have focused on their differing coverage by the Act. 202 N.L.R.B. at 318, 82 L.R.R.M. at 1566.

[25]The majority of the Board panel affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommended order. 202 N.L.R.B. at 318, 82 L.R.R.M. at 1569. However, the Board panel corrected the administrative law

emphasized that the discharges of the two supervisors violated section 8(a)(1) because of the context in which they occurred; they were a part of the employer's total strategy to rid itself of the union by committing unfair labor practices.[26]

Many decisions were rendered subsequent to *Fairview Nursing Home* which indicate that the discharge of a supervisor may be considered illegal as an integral part of a pattern of conduct aimed at penalizing employees for exercising their statutory rights if the discharge is factually related, although not causally connected,[27] to other unfair labor practices directed against employees.[28] Three decisions, *Downslope Industries*,[29] *Nevis*

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judge's erroneous conclusion that the discharges of the supervisors violated § 8(a)(3) (as well as § 8(a)(1)) of the Act and former Member Penello stated his own reasons for concurring in the conclusion that the discharges were unlawful. *Id.* at 318 n.2, 82 L.R.R.M. at 1569. *See* notes 21-36 and accompanying text *supra*.

[26]The administrative law judge stated in pertinent part:

> There is no doubt that Mrs. Johnston [employer's owner] intended to and did discharge employees because they signed union cards and that the true purpose of the Respondent was to discourage membership in a labor organization. The discharges of card signers [supervisors] Henderson and Grammer were in furtherance of the same purpose and a part of the Respondent's strategy to rid itself of the Union. Their discharges had a tendency to cause employees to forsake or avoid membership in a union for fear that they would be subjected to the same reprisal. As stated in *Miami Coca-Cola Bottling Company d/b/a Key West Coca Cola Bottling Company* 140 NLRB 1359, 1361, discharges such as those of Henderson and Grammer are "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." (Cited with approval in *Krebs & King Toyota, Inc., supra*).

Fairview Nursing Home, 202 N.L.R.B. at 324 n.34, 82 L.R.R.M. at 1571.

[27]A "causal connection" presupposes that the discharge of a supervisor is a necessary and inseparable step in the commission of unfair labor practices which directly affect employees. To say that there is a "factual relation" but not a "causal connection" between the discharge of a supervisor and unfair labor practices directed against the rank-and-file is to say that these acts are separable parts of one entire course of employer conduct; the unfair labor practices could have been committed without the discharge of a supervisor and vice versa.

[28]*See, e.g.*, DRW Corp., 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980); Southern Plasma Corp., 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); Downslope Industries, Inc., 246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979); Nevis Industries, Inc., 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979); Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); East Belden Corp., 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978); Donelson Packing Co., 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978); Barnes & Noble Bookstores, Inc., 233 N.L.R.B. 1326, 97 L.R.R.M. 1176 (1977) (even if individual held to be employee were a supervisor, his discharge for organizing a union would violate § 8(a)(1) under the "integral part of a pattern of misconduct" rationale).

[29]246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979). The case arose from the following facts. Supervisor Helen Scarlett acted as spokesperson for female employees who were subjected to sexual harassment by the employer's manager. When the employees

Industries,[30] and *DRW Corporation*,[31] clarify how a majority of the Board (as it was then constituted)[32] viewed the requirements for establishing a violation of section 8(a)(1) in supervisor discharge cases.

Chairman Fanning, Member Jenkins, and former Member Penello found that the discharge of a supervisor violates section 8(a)(1) as an integral part of a pattern of conduct aimed at penalizing employees for the exercise of their statutory rights if, in firing the supervisor, the employer was motivated by hostility toward the employees engaging in union or other protected activities and not by a desire to insure supervisory loyalty.[33] The fact that the employer acted with a hostile motivation in firing a supervisor can be inferred from the

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refused to work in order to bring the problem to higher management's attention, they were fired in violation of § 8(a)(1). Shortly after the protesting employees were discharged, Supervisor Scarlett, who had not participated in the protest, was discharged and no reason was stated for her termination. A majority of the Board held that her discharge violated § 8(a)(1).

[30]246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979). In *Nevis Industries*, when the respondent employer took over ownership and control of a hotel complex, it terminated the entire engineering crew (including Supervisor Ernest Brewer, a union member) in an effort to avoid recognizing and bargaining with the union that represented the engineering employees. The Board unanimously agreed with the administrative law judge's finding that the employer had violated § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (a)(3) (1976), by refusing to retain the nonsupervisory employees because of their union affiliation. A majority of the Board held that the discharge of Supervisor Brewer was an unfair labor practice violative of § 8(a)(1).

[31]248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980). The decision in *DRW Corp.* arose from the following facts. Supervisor David Oatman and employee Bradley Houk were the most active organizers of a union among the rank-and-file. They sounded out employees about their interest in joining the union, contacted a union, arranged for a union meeting with employees at Oatman's home, and distributed union literature and union authorization cards. In response to the union campaign, the employer committed numerous unfair labor practices which were held to violate § 8(a)(1). The employer unlawfully terminated Houk, in violation of §§ 8(a)(1) and 8(a)(3). In addition, the employer discharged Supervisor Oatman and then informed the employees that Oatman and Houk had been fired for being union instigators. A majority of the Board panel held that the supervisor's discharge violated § 8(a)(1).

[32]At the time the three decisions discussed in the text were rendered, the National Labor Relations Board was comprised of Chairman John H. Fanning, Howard Jenkins, Jr., Betty Southard Murphy, John A. Penello, and John C. Truesdale. Members Murphy, Penello and Truesdale no longer serve on the Board.

Board membership changes with some frequency because Board members are appointed to five-year terms by the President of the United States with the advice and consent of the Senate. The President designates the Chairman. 29 U.S.C. § 153(a) (1976).

[33]DRW Corp., 248 N.L.R.B. at 828-29, 103 L.R.R.M. at 1508 (1980) (Jenkins & Penello); Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 5-6, 103 L.R.R.M. at 1042-43 (1979) (Fanning & Jenkins); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 7-9, 103 L.R.R.M. 1036-37 (1979) (Fanning & Jenkins); and, *id.* at 11-12, 103 L.R.R.M. at 1038 (Penello).

context in which the discharge occurred (*i.e.*, the employer committed unfair labor practices in an effort to thwart the employees' exercise of statutory rights).[34] Moreover, if a supervisor's discharge did occur in a context in which the employer engaged in widespread unfair labor practices directed against the rank-and-file, it was held necessary to reinstate, with back pay, the discharged supervisor to offset the coercive effect of the employer's misconduct.[35] The fact that the employer may be compelled to reinstate a disloyal supervisor was not an obstacle to the Board's ordering this remedy; the supervisor's degree of involvement with union activity is of "questionable significance" and is relevant to the issue of the employer's motivation.[36]

A different approach to the supervisor discharge cases might be taken, as shown by the opinions of former Member Murphy and former Member Truesdale in *Downslope Industries*,[37] *Nevis Industries*,[38] *DRW Corporation*,[39] and *Sheraton Puerto Rico Corporation*.[40] They would emphasize the congressional determination to exclude supervisors from the Act and would find a section 8(a)(1) violation based on the discharge of a supervisor only "where it is a means to facilitate a direct violation of employee statutory rights. . ."[41] or "where the discharge . . . was part of a scheme to interfere directly with, or to clear the way for interfering directly with, employees'

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[34]DRW Corp., 248 N.L.R.B. at 828-30, 103 L.R.R.M. at 1508-09 (1980) (Jenkins & Penello); Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 5-6, 103 L.R.R.M. at 1042-43 (1979) (Fanning & Jenkins); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. at 1036-37 (1979) (Penello).

[35]DRW Corp., 248 N.L.R.B. at 829, 103 L.R.R.M. at 1509 (1980) (Jenkins & Penello); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 7-9 (1979) (Fanning & Jenkins); *id.* at 11, 103 L.R.R.M. at 1038 (Penello).

[36]DRW Corp., 248 N.L.R.B. at 829 n.11, 103 L.R.R.M. at 1509 (1980).

[37]246 N.L.R.B. No. 132, slip op. at 10-12, 103 L.R.R.M. at 1043 (1979) (Truesdale concurring); *id.* at 12-20, 103 L.R.R.M. at 1044-46 (Murphy dissenting).

[38]246 N.L.R.B. No. 167, slip op. at 13-18, 103 L.R.R.M. at 1039-40 (1979) (Murphy dissenting); *id.* at 19-20, 103 L.R.R.M. at 1040-41 (Truesdale dissenting).

[39]248 N.L.R.B. at 830-34, 103 L.R.R.M. at 1509-13 (1980) (Truesdale dissenting).

[40]248 N.L.R.B. 867, 868-69, 103 L.R.R.M. 1547, 1549-50 (1980) (Truesdale dissenting). The case arose from the following facts. A letter complaining about the general manager's operation of a hotel was drafted, signed, and sent by the hotel's employees and supervisors to company headquarters. The general manager discharged the employees and supervisors who had signed the letter if they understood that it had called for his discharge. He then circulated a letter to employees in which he stated that supervisors had been discharged for their participation in the letter and in which he threatened a similar penalty for such conduct if it occurred in the future. The majority of the Board panel held that the discharges of the supervisors, as well as the discharges of employees, violated § 8(a)(1).

[41]Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 17, 103 L.R.R.M. at 1045 (1979) (Murphy dissenting).

protected rights or where a supervisor was discharged for engaging in conduct intended to protect employees from interference and discrimination proscribed by the Act."[42] More precisely, they would decide cases by a close factual analysis of whether the supervisor's discharge had a direct impact on the employees' exercise of statutory rights.[43] Neither former Members Murphy nor Truesdale would make the employer's motivation the determinant of whether the discharge violates section 8(a)(1).[44]

Although many decisions since *Pioneer Drilling*[45] have resulted in a finding that the discharge of a supervisor violated section 8(a)(1), there have been many cases where the Board has rejected the contention that such a discharge was illegal. In these cases, the supervisor's discharge was held not to violate section 8(a)(1) for one or more of the following reasons: the supervisor sided with employees in their economic dispute with the employer;[46] the supervisor engaged in union activities or other conduct inconsistent with his status;[47] the employer did not embark on a pattern of misconduct aimed at rank-and-file employees;[48] or the supervisor's discharge did not have the adverse impact on the employees' exercise of statutory

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[42]*Id.* at 14, 103 L.R.R.M. at 1044. Member Truesdale would also decide supervisory discharge cases by applying this standard. *Id.* at 11, 103 L.R.R.M. at 1043 (Truesdale concurring); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 19, 103 L.R.R.M. at 1041 (1979) (Truesdale dissenting).

[43]*See, e.g.*, Member Murphy's examination of the facts, particularly the timing of the supervisor's discharge and the evidence pertaining to the reason for her discharge, in Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 13 & n.13, at 15 & n.19, at 16 & nn.20 & 21, 103 L.R.R.M. at 1044, 1045 (1979) (Murphy dissenting). Similarly, Member Murphy analyzed the reason for the supervisor's discharge and the timing of the discharge in relation to its impact on employees in Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 14-17, 103 L.R.R.M. at 1039-40 (1979) (Murphy dissenting).

[44]DRW Corp., 248 N.L.R.B. at 830, 103 L.R.R.M. at 1509 (1980) (Truesdale dissenting); Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 17, 103 L.R.R.M. at 1045 (1979) (Murphy dissenting).

[45]162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

[46]*See, e.g.*, Long Beach Youth Center, 230 N.L.R.B. 648, 650, 95 L.R.R.M. 1451, 1453 (1977), *enforced*, 591 F.2d 1276 (9th Cir. 1979); Sibilio's Golden Grill, Inc., 227 N.L.R.B. 1688, 1688, 91 L.R.R.M. 1439, 1440 (1977), *enforced mem.*, 573 F.2d 1302 (3rd Cir. 1978).

[47]In addition to the cases cited note 46 *supra*, *see, e.g.*, L & S Enterprises Inc., 245 N.L.R.B. No. 144, 102 L.R.R.M. 1415 (1979); Twin County Grocers, Inc., 244 N.L.R.B. No. 168, 103 L.R.R.M. 1230 (1979); Daniel Construction Co., 244 N.L.R.B. No. 106, 102 L.R.R.M. 1399 (1979); K. Kristofferson, 184 N.L.R.B. 159, 74 L.R.R.M. 1645 (1970) (United Painting Contractors), *enforced per curiam sub nom.* Johnson v. NLRB, 441 F.2d 266 (4th Cir. 1971); Bowling Corp. of America, 170 N.L.R.B. 1768, 68 L.R.R.M. 1207 (1968); Texas Gulf Sulphur Co., 163 N.L.R.B. 88, 64 L.R.R.M. 1302 (1967).

[48]*See, e.g.*, Stop & Go Foods, 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979); Twin County Grocers, Inc., 244 N.L.R.B. No. 168, 103 L.R.R.M. 1230 (1979).

rights proscribed by section 8(a)(1).[49] These cases are not surprising because they follow from the majority's view that the employer's motivation (generally shown by the context in which the supervisor's discharge occurred) is the determinant of the legality of the supervisor's discharge under the "integral part of a pattern of misconduct" rationale.[50]

In summary, since its 1967 decision in *Pioneer Drilling*, the Board has developed a concept that an employer's discharge of a supervisor in connection with a union organization campaign or similar protected activities by employees violates section 8(a)(1) if it is an integral part of a pattern of conduct aimed at penalizing employees for exercising their statutory rights. A majority of the Board has found that the supervisor's discharge is an integral part of such a pattern of misconduct if the employer acted out of hostility toward the employees' exercise of statutory rights rather than out of a legitimate desire to insure the loyalty of its supervisory personnel. This hostile motivation may be inferred from the employer's commission of other unfair labor practices. It need not be established that the discharge of the supervisor was the means by which the employer committed the unfair labor practices which directly affected the rank-and-file in order for the Board to find the discharge unlawful.

In viewing the development of Board policy, one must ask if it is true, as former Member Truesdale contended, "that the Board has made a quantum leap from a unique factual situation [*Pioneer Drilling*] to a general proposition that supervisors who make common cause with rank-and-file employees and are the recipients of the same treatment meted out to employees share the protection of the Act extended to employees."[51]

III. Board Policy and Congressional Intent

In *Nevis Industries*, Chairman Fanning and Member Jenkins

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[49]*See, e.g.*, Simpson Electric Co., 250 N.L.R.B. No. 35 (1980); Stop & Go Foods, Inc., 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979); Texas Gulf Sulphur Co., 163 N.L.R.B. 88, 64 L.R.R.M. 1302 (1967). *See also* Woodline, Inc., 231 N.L.R.B. 863, 97 L.R.R.M. 1288 (1977), *enforced per curiam*, 577 F.2d 463 (8th Cir. 1978) (no evidence that employer forced supervisor to resign, but had employer forced supervisor to resign because he had engaged in union activities, speculative that this would have had chilling effect on employees' protected activities).

[50]The role of the employer's motivation in establishing a violation of § 8(a)(1) is more fully discussed in notes 60-69 and accompanying text *infra*.

[51]DRW Corp., 248 N.L.R.B. at 833, 103 L.R.R.M. at 1510 (1980) (Truesdale dissenting).

considered whether *Pioneer Drilling*[52] and its progeny are in accord with the congressional determination to exclude supervisors from the protection of the National Labor Relations Act:

> Initially, we reject their [Member Murphy's and Member Truesdale's] contention that the statute precludes a finding that Respondent violated Section 8(a)(1) when it terminated and refused to rehire Supervisor Brewer. They rely essentially upon Section 2(3) of the Act, which excludes supervisors from the definition of employees. Examination of that section and its legislative history, however, makes plain that this section was added in 1947 to negate the Board's judicially approved policy of certifying bargaining units of foremen by excluding supervisors from the definition of employee. Despite the fact that Congress contemplated and intended to permit an employer to discharge a supervisor for engaging in union activity, there is no evidence that Congress intended to alter the Board's previous policy of providing a reinstatement remedy when a supervisor was discharged for refusing to participate in an unlawful antiunion campaign. Nor is there any evidence that Congress sought to restrict otherwise the Board's authority to grant appropriate affirmative relief whenever an employer's action against a supervisor tends to coerce employees . . . .[53]

There is no evidence that by excluding supervisors from the Act's protection, Congress intended to restrict the Board's authority to order the reinstatement of a supervisor to remedy unfair labor practices. However, there is no evidence that Congress even considered the question of the Board's authority to order the reinstatement of a supervisor in cases like the progeny of *Pioneer Drilling*.[54]

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[52]162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

[53]246 N.L.R.B. No. 167, slip op. at 4-5, 103 L.R.R.M. at 1036-37 (1979) (citations omitted). Chairman Fanning and Member Jenkins cited sections 2(11) & 14(a) of the Act; Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); and H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1947) (discussing the seeming inconsistency of according supervisors organizational rights with the policy of assuring employees freedom from domination by supervisors in their own organizing and bargaining and the right of employers to their agents' loyalty).

[54]The Taft-Hartley Act is framed in terms of requiring an employer to reinstate "employees," not supervisors. Section 10(c) of the Labor Management Relations (Taft-Hartley) Act, 1947, provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then

Thus, that Congress did not intend to limit the Board's remedial authority is no assurance that the Board's decisions since *Pioneer Drilling* have been consistent with the congressional purpose.

When the Taft-Hartley amendments were considered, Congress focused on whether the National Labor Relations Act should be changed so that no labor organization could use statutory procedures[55] to compel an employer to recognize it and bargain with it as the representative of supervisors[56] or whether the Act should be amended to allow a labor organization which represents only supervisors and is not dominated by rank-and-file employees to avail itself of the statutory processes to gain recognition.[57] Underlying these particular questions was a basic concern with insuring that the employer could insist on the undivided loyalty of its supervisory personnel.[58] The practical effect of the Board's reinstatement of a

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> the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including *reinstatement of employees* with or without back pay, as will effectuate the policies of this [Act]: *Provided*, That where an order directs *reinstatement of an employee*, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . No order of the Board shall require the *reinstatement of any individual as an employee* who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. § 160(c) (1976) (emphasis added).

The Board has authority to order the reinstatement of a supervisor although § 10(c) of the Act refers only to the reinstatement of employees. NLRB v. Electro Motive Mfg. Co., 389 F.2d 61 (4th Cir. 1968). However, "[c]ourts have used reinstatement of a discharged supervisor as a remedy sparingly and in only narrowly defined circumstances." NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1294 (5th Cir. 1980) (court refused to enforce Board order requiring reinstatement, with back pay, of supervisors who played significant roles in employees' organizational efforts and who were found by the Board to have been discharged as an integral part of a pattern of conduct aimed at penalizing employees for their protected activity).

[55]Section 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a) (1976) provides procedures whereby employees may designate or select an exclusive representative for the purposes of collective bargaining with the employer about rates of pay, wages, hours of employment, or other conditions of employment. For a discussion of the reciprocal rights and obligations of an employer and an exclusive bargaining representative, *see* Section of Labor Relations Law, American Bar Association, C. MORRIS, THE DEVELOPING LABOR LAW, (1971 & Supp. 1975, 1976, 1977, 1978).

[56]H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1948); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1948); 93 Cong. Rec. 3952 (1947) (remarks of Sen. Taft).

[57]House Minority Report No. 245, 80th Cong. 1st Sess. 72 (1947); Senate Minority Report No. 105, Pt. 2 at 39-40 (1947); 93 Cong. Rec. 4566 (1947) (remarks of Sen. Johnston); 93 Cong. Rec. 5118 (1947) (remarks of Sen. Pepper).

[58]NLRB v. Bell Aerospace Co., 416 U.S. 267, 281 (1974); Beasley v. Food Fair, 416 U.S. 653, 659-60 (1974) ("Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were obliged to

supervisor who was involved in union activity on behalf of the rank-and-file is to force the employer to accept as part of its management team someone whose interests are in conflict with its own. This result was not envisioned by Congress, as the Fifth Circuit Court of Appeals has recognized in a recent decision, *N.L.R.B. v. Southern Plasma Corp.*[59]

Quite apart from whether the outcome of the Board's decision making in supervisor discharge cases can be reconciled with congressional intent is the issue of whether the Board's approach in such cases emphasizes factors which promote the fair administration of the Act and which are based on realistic expectations about human behavior.

IV. Employer Motivation in Supervisor Discharge Cases

The various decisions of the Board make it apparent that the crucial determinant of the legality of the discharge of a supervisor is the employer's motivation.[60] That is to say, the Board will determine supervisor discharge cases by reference to:

> the teachings of [*N.L.R.B. v. John Brown*], 380 U.S. 278 (1965), wherein the Supreme Court held that the determination of the legality of employer conduct which could tend to interfere with employee rights but which could also have a legitimate business purpose depends, first, on an evaluation

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be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty. . . ." (citation omitted)); Carpenters Dist. Council v. NLRB, 274 F.2d 564, 566 (D.C. Cir. 1959) (The congressional purpose in enacting § 2(3) in 1947 "was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations.").

[59]In NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1294-95 (5th Cir. 1980), the court refused to enforce a Board order requiring reinstatement and back pay for two supervisors who had played a significant part in employees' organizational efforts and whose discharges were found to be an integral part of a pattern of conduct aimed at penalizing employees for their protected, concerted activity. The court stated, "Here the employees and supervisors lost their jobs because they chose to organize. Congress specifically decided not to protect supervisors from *precisely* this kind of conduct. . . . To enforce the Board's order reinstating supervisors Baker and Parker would swallow whole the Congressionally imposed exclusion [from the Act] for supervisors." *Id.* at 1295.

[60]In addition to the authorities cited note 33 *supra*, *see* Empire Gas Co., 254 N.L.R.B. No. 76, slip op. at 10-13 (Jan. 14, 1981); G & M Lath and Plaster Co., 252 N.L.R.B. No. 137, slip op. at 20, 105 L.R.R.M. 1556 (1980); Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); L & S Enterprises, 245 N.L.R.B. No. 144, slip op. at 3, 102 L.R.R.M. 1415 (1979); Twin County Grocers, Inc., 244 N.L.R.B. No. 168, slip op. at 7, 102 L.R.R.M. 1271 (1979); Barnes & Noble Bookstores, Inc., 233 N.L.R.B. 1326, 1343 n.18, 97 L.R.R.M. 1176 (1977); Fairview Nursing Home, 202 N.L.R.B. at 318 n.2, 82 L.R.R.M. at 1566.

> of the employer's motive in engaging therein and, second, assuming no evidence of illegal motive, on a balancing of the coercive effects against the asserted business justification. Thus, where there is no evidence of a tainted motive such employer conduct will not be deemed unlawful if its tendency to interfere with employee rights is "comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate ends."[61]

If an employer committed unfair labor practices and fired a supervisor with an intent to discourage employees from engaging in union or other protected activities rather than out of a desire to discourage such activities by supervisors and to insure supervisor loyalty, the Board will find that the discharge violates section 8(a)(1) as an integral part of a pattern of conduct aimed at penalizing employees for exercising section 7 rights.[62]

Was former Member Truesdale correct in his assertion that "making motivation a touchstone of supervisory discharge cases is wrong as a matter of policy as well as law. . ."?[63]

It is uncertain whether the Board is required, as a matter of law, to find that an employer violated section 8(a)(1) because discharge of a supervisor was motivated by hostility to the employees' exercise of statutory rights (a "hostile motivation").[64] The Board's

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[61]Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 7-8, 103 L.R.R.M. at 1036 (citation omitted).

[62]*See* cases cited note 33 *supra*.

[63]248 N.L.R.B. at 833, 103 L.R.R.M. at 1512 (Truesdale dissenting).

[64]For a discussion of whether the employer's hostile motivation is an element in establishing a violation of § 8(a)(1) generally, *see* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of The Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORN. L.Q. 491 (1967).

There are a number of cases which suggest that violation of § 8(a)(1) is determined by the effect of an employer's conduct and not by his motivation. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965) ("Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated . . . . A violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive."); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964) (employer violated § 8(a)(1) when, in good faith, it discharged several employees engaged in protected activities in the mistaken belief that the employees had engaged in misconduct); NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1293 (5th Cir. 1980) (a supervisor discharge case in which the court, discussing another aspect of the case, stated that § 8(a)(1) "requires weighing the effect on employee rights against the employer's business justification for his actions; discriminatory motive need not be present."); Crown Central Petroleum Corp., 430 F.2d 724, 729 (5th Cir. 1970) (the tendency of an

unquestioning reliance on *Brown*[65] is misplaced. While in that case the Supreme Court did address the issue of what part employer motivation plays in the legality of conduct alleged to violate section 8(a)(1), it did so in a context which was significantly different from the supervisor discharge cases. Hence, the teachings of *Brown* may not apply to supervisor discharge cases.[66] The Court has not established what criteria are to be applied by the Board in determining whether the dismissal of a supervisor violates section 8(a)(1).

The Board's emphasis on motivation ignores the realities of industrial life. One might suppose that almost every employer wishes to discourage union activities among his employees. One might further assume that in discharging a supervisor who is connected with union activities, an employer often acts out of "mixed motives" *i.e.*, to insure supervisor loyalty and to discourage union activities among employees. This state of mind should not render the employer's conduct unlawful.[67]

> It may well be asked whether the thrust of the National Labor Relations Act is to prohibit bad thoughts, or to curb harmful conduct. And if the latter, are bad thoughts to be

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employer's action to interfere with Section 7 rights, and not the employer's motive or good faith, is determinative of whether § 8(a)(1) has been violated). However, these cases relate to the issue of whether the employer's good faith is a defense to the § 8(a)(1) charge; the cases indicate it is not. The supervisor discharge cases present a different question, namely, whether the presence of a hostile motive (the absence of good faith) renders the employer's conduct unlawful.

[65]380 U.S. 278 (1965).

[66]In *Brown Food*, the nonstruck members of a multi-employer collective bargaining group had locked out their employees and had continued to operate with temporary replacements in response to a whipsaw strike (*i.e.*, a strike called by a union against one member of a multi-employer group in order to divide the group and thereby cause settlement of a labor dispute on terms favorable to the union). The Court held that the employers' conduct violated neither § 8(a)(1) nor § 8(a)(3) of the Act. 380 U.S. 278 (1965).

Brown Food is significantly different from the supervisor discharge cases because in the former decision, the employers' actions arguably violated § 8(a)(3) as well as § 8(a)(1). Unlike § 8(a)(1), whose legislative history and language speak in terms of the impact or effect of the employer's conduct, § 8(a)(3) suggests a *scienter* requirement. NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1293 (5th Cir. 1980); Oberer, *supra* note 64, at 510. Thus, the role which employer motivation plays in establishing a violation of the Act should differ depending upon whether the employer's conduct is alleged to violate § 8(a)(3) (from which a violation of the general prohibition in § 8(a)(1) is derived) as in *Brown Food*, or only § 8(a)(1), as in the supervisor discharge cases. Oberer, *id.*

[67]In Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980), the majority of the Board panel stated that their approach to the problem is not dependent on the employer's state of mind. However, the opinion emphasizes that in unlawfully discharging certain supervisors, the employer's general manager was not concerned with supervisor loyalty.

> held to make harmless conduct illegal? If the Congress in 1935 intended to punish all employers then harboring unkind views as to unions it invested the Board with a truly Herculean task. It is more probable that Congress attempted to curb employer action rather than employer thought, and that the concern was with injury to employee rights, however pure or impure the motivation for that injury.[68]

The Board's inquiry into whether an employer acted out of a hostile motivation in discharging a supervisor injects difficult problems of proof into the administration of the Act.

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.[69]

In response to the improbability of obtaining direct evidence that an employer fired a supervisor with an intent to chill the employees' union or other protected activities, the Board has to evaluate the context in which the supervisor's discharge occurred to determine the employer's motivation. The Board determines whether unfair labor practices were committed in that the discharge of the supervisor was unlawful as an integral part of a pattern of conduct aimed at penalizing employees for exercising their section 7 rights.[70]

> Clearly, supervisory participation in concerted or union activity is not protected and supervisors who engage in such activity do so at their peril. However, the fact that supervisors and employees alike have been discharged and otherwise coerced for engaging in union activity is evidence

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[68]Christensen & Svanoe, *supra* note 64, at 1326-27.

[69]Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966). This quotation was recited with approval by the Board in Darlington Mfg. Co., 165 N.L.R.B. 1074, 1083 n.16, 65 L.R.R.M. 1391 (1967).

[70]*See* cases cited note 34 *supra*. *See also, e.g.*, G & M Lath and Plaster Co., 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); Southern Plasma Corp., 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); East Belden Corp., 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978); Donelson Packing Co., 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978); Fairview Nursing Home, 202 N.L.R.B. 318, 82 L.R.R.M. 1566, *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

> which, under proper circumstances, warrants the inference that the action against the supervisor, like that taken against the employees, was unlawfully motivated. Moreover, when the evidence shows that the respondent has engaged in a widespread pattern of misconduct . . . a remedy which encompasses all individuals affected is appropriate.[71]

The Board's "context approach," in which it judges the legality of a supervisor's discharge by whether unfair labor practices were committed, may be criticized on several grounds.

In many supervisor discharge cases, the context approach conflicts with the way section 8(a)(1) has otherwise been applied. It is established that the discharge of a supervisor (or other employer conduct) does not violate section 8(a)(1) if it merely has an incidental effect on the employees' exercise of statutory rights.[72] Yet, it is in

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[71]248 N.L.R.B. at 829, 103 L.R.R.M. at 1509 (Jenkins & Penello) (citation omitted). Former Member Penello has articulated this connection between the Board's emphasis on context and the Board's search for a hostile motivation:

> [W]hen an employer has engaged in a widespread pattern of misconduct against its employees and supervisors alike, it may be inferred that the action taken against the supervisors was motivated not solely by any concern about the union or concerted activities of its management personnel, but rather by a desire to discourage such activities on the part of its employees in general. . . . [B]y engaging in such a widespread pattern of misconduct against employees and supervisors, an employer, intentionally or otherwise, makes it impossible for its employees to perceive the distinction between its right to prohibit its supervisors from engaging in union or concerted activity and its obligation to permit employees to freely exercise their Section 7 rights. Thus, in the context of such widespread misconduct, the coercive effect upon employees as a result of action taken against the supervisor is not merely an unavoidable consequence of the discharge of an unprotected individual. Indeed, the coercive effect in such circumstances is the same as that arising from the action taken against the employees. Therefore, reinstatement with backpay for the supervisor is "necessary to fully offset the coercive effects of the employer's total course of conduct."

Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. 1035, 1038 (1979) (citations omitted).

[72]Texas Co. v. NLRB, 198 F.2d 540, 544 (9th Cir. 1952) (court concurs in Board's holding that discharge of supervisor for refusing to perform rank-and-file work during a strike is privileged and any discouragement of union membership caused by the discharge would be "incidental and permissible"); Panaderia Sucesion Alonso, 87 N.L.R.B. 877, 881, 25 L.R.R.M. 1146, 1149 (1949) (discharge of a supervisor for union activities had only an incidental effect on employees' exercise of statutory rights and therefore does not cause the employer's privileged conduct to become an unfair labor practice).

The fact that a supervisor's discharge has the incidental effect of causing employees to fear that the same fate will befall them is not a sufficient basis for finding that the discharge violates § 8(a)(1). Stop & Go Foods, 246 N.L.R.B. No. 170, slip op. at 10, 103 L.R.R.M. 1046, 1049 (1979). As the court stated in Oil City Brass Works

those instances where the discharge of a supervisor is most likely to be found illegal *i.e.*, in cases where the employer engaged in widespread unfair labor practices, that the actual impact of a supervisor's discharge on the employees' exercise of section 7 rights will be most minimal or incidental. For example, if as in *Fairview Nursing Home*[73] the employer committed numerous unfair labor practices to thwart unionization and fired more than forty employees because they had signed union cards, it is unlikely that the contemporaneous discharge of two supervisors actually will have had an effect on the employees' protected activities.

Yet, in *Fairview Nursing Home* and similar cases,[74] the Board is more likely to find that the discharge of a supervisor is unlawful than in a case where the discharge is an isolated incident.[75] Moreover, in those cases where the employer has engaged in pervasive unfair labor practices which directly affect employees and has fired one or more supervisors, it is typically not necessary for the Board to order the reinstatement with back pay of the discharged supervisor to dissipate the coercive effect of the employer's conduct.[76] If,

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v. NLRB, 357 F.2d 466, 470 (5th Cir. 1966) (employer's refusal to recall a supervisor from layoff because he had testified at an NLRB hearing violated § 8(a)(1)):

> Any time an employee, be he supervisor or not, is fired for union activity, rank-and-file employees are likely to fear retribution if they emulate his example. But the Act does not protect supervisors, it protects rank-and-file employees in the exercise of their rights. If the fear instilled in rank-and-file employees were used in order to erect a violation of the Act, then any time a supervisor was discharged for doing an act that a rank-and-file employee may do with impunity the Board could require reinstatement. Carried to its ultimate conclusion, such a principle would result in supervisory employees being brought under the protective cover of the Act.

[73]202 N.L.R.B. 318, 82 L.R.R.M. 1566.

[74]G & M Lath and Plaster Co., 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. 1035 (1979); Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 1, 103 L.R.R.M. 1042 (1979); Southern Plasma Corp., 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); East Belden Corp., 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978).

[75]In Stop & Go Foods, Inc., 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979), it was held that the supervisor's discharge did not violate § 8(a)(1) in the absence of evidence that it was a part of a pattern of misconduct aimed at coercing employees; the only question before the administrative law judge and Board was whether the discharge of the supervisor for striking and picketing was unlawful. Similarly, in Twin County Grocers, Inc., 244 N.L.R.B. No. 168, 102 L.R.R.M. 1271 (1979), it was held that the discharge of a supervisor did not violate § 8(a)(1) because it was motivated by an intent to restrict a supervisor from engaging in union activities; the unfair labor practice complaint was dismissed in its entirety because employer's conduct pertaining to the supervisor was the only issue.

[76]DRW Corp., 248 N.L.R.B. at 830-34, 103 L.R.R.M. at 1509-13 (Member Truesdale dissenting).

for example, the Board were to order the reinstatement with back pay of more than forty unlawfully discharged employees, this would adequately demonstrate to the employees the extent of the Act's protection of their right to engage in concerted activities. An order to reinstate a supervisor with back pay would be superfluous so far as the employees' perceptions are concerned.

The Board's "context approach" is to treat the employer's discharge of a supervisor and unfair labor practices directly affecting nonsupervisory employees as a totality rather than as a series of separable acts, the legality of each of which must be determined. Consequently, presumptively lawful conduct, such as an employer's dismissal of a supervisor because he involved himself in union activities,[77] becomes illegal because the employer has violated the Act in other respects at about the same time. In criticism of the Board's approach, it can be said that the employer's "statutory prerogative to select supervisors according to its own criteria . . . should not be diminished because the employer chooses to exercise it about the same time as it unlawfully disciplines or discharges its employees for engaging in protected concerted or union activities."[78]

While the Board emphasizes the context in which the supervisor discharge occurs as indicative of the employer's motivation, it does not closely inquire into whether the discharge was, *in fact*, an integral part of the employer's misconduct directed against nonsupervisory employees. In cases subsequent to *Pioneer Drilling* and *Krebs & King Toyota*, the Board did not seek to find a causal relationship[79] between the supervisor's discharge and the employer's acts of misconduct directed against the rank-and-file.[80] If there was merely a temporal relationship between the discharge and unfair labor practices directed against employees, the Board has been prone

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[77]Beasley v. Food Fair, Inc., 416 U.S. 653, 654-55 (1974) (The Taft-Hartley Act "freed employers to discharge supervisors without violating the [National Labor Relations] Act's restraints against discharges on account of labor union membership."); Times Herald Printing Co., 252 N.L.R.B. No. 43, slip op. at 16 (Sept. 19, 1980) ("a discharge of a supervisor for engaging in union activities does not violate the Act."); The Mousetrap of Miami, Inc., 174 N.L.R.B. 1060, 70 L.R.R.M. 1429 (1969) (discharge of a supervisor for organizing union of rank-and-file employees is lawful).

[78]Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 17, 103 L.R.R.M. at 1038 (1979) (Member Murphy dissenting).

[79]For a discussion of the concept of a "causal relationship," *see* note 27 *supra*.

[80]*Cf.* J.D. Lunsford Plumbing, Heating & Air Conditioning, Inc., 237 N.L.R.B. 128, 99 L.R.R.M. 1109 (1978) in which the Board held that the resignation of a supervisor because he had suffered a loss of contractual benefits and continued representation by a union was not a constructive discharge violative of § 8(a)(1). In finding that the supervisor's resignation was not an integral part of a pattern of misconduct directed against nonsupervisory employees, the administrative law judge emphasized that there was no nexus between the actions directed at the supervisor and illegal acts directed at employees although these acts occurred at the same time.

to conclude that the supervisor discharge is unlawful under its "integral part of a pattern of conduct" rationale.[81] Unless the Board modifies its approach and examines whether, *in fact*, there is more than a mere temporal relationship between the discharge of a supervisor and a pattern of misconduct aimed at nonsupervisory employees, one could agree with former Member Murphy that:

> [The Board has adopted] the untenable position that anytime a supervisor is fired in close proximity with employees who are found to have been unlawfully discharged under the Act the supervisor's discharge is also protected. In so doing, they [Chairman Fanning, Member Jenkins and then-Member Penello] are improvidently extending the protection section 7 offers to employees to cover the concerted and union activities of supervisors. Whether this result is desirable or not . . . [it is] a proscribed one which takes congressional action, not decisional fiat, to achieve.[82]

V. CONCLUSION

In summary, the National Labor Relations Board has evolved the rule that an employer's discharge of a supervisor in connection with employees' activities protected by section 7 of the Act violates section 8(a)(1) if the discharge was an integral part of a pattern of conduct by the employer aimed at penalizing employees for exercising their statutory rights. The Board will find that the discharge of a supervisor is an integral part of such a pattern of conduct and therefore unlawful if the employer's motive in firing the supervisor was hostility to the employees' exercise of section 7 rights and not a desire to insure the loyalty of its supervisory personnel. In most cases, the fact that the employer had such a hostile motivation is inferred from the employer's commission of unfair labor practices which directly affect the rank-and-file.

The Board's approach to supervisor discharge cases can be criticized on several grounds. The Board has not adequately addressed the issue of whether an order compelling an employer to reinstate, with back pay, a supervisor who engaged in union or similar activities is in accord with the congressional determination that supervisors must be excluded from the protection of the National Labor Relations Act. The Board's view of the role employer motivation plays ignores the tendency of employers to fire a supervisor out of "mixed motives". Moreover, the emphasis on motivation introduces difficult problems of proof in the administration of the Act and results in the

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[81]*See* cases cited notes 70 & 74 *supra*.

[82]Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 12, 103 L.R.R.M. at 1044 (1979) (citations omitted).

Board giving undue emphasis to the broad context in which the discharge occurred as the determinant of the legality of the discharge. As a consequence, presumptively lawful conduct, such as the employer's discharge of a supervisor for engaging in union activities, becomes unlawful although the discharge bore no causal relationship to the unfair labor practices which were directed against employees. In addition, the Board's proclivity for finding that the discharge of a supervisor violates section 8(a)(1) because the employer also engaged in widespread misconduct conflicts with the well-established principle that employer conduct which merely has an incidental impact on the employees' exercise of section 7 rights will not be found to violate section 8(a)(1).

It appears that the Board has gone astray by treating employer motivation as the determinant of whether the employer violated section 8(a)(1) by discharging its supervisor who, in more cases than not, actively promoted the interests of a union or engaged in activities antagonistic to the goals of higher management.

The Board should instead adopt a balancing approach. That is to say, the Board should consider whether, *in fact*, the employer's discharge of a supervisor tended to significantly interfere with, restrain, or coerce employees in the exercise of their section 7 rights.[83] If the employer's conduct did have this tendency,[84] then the

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[83]In other contexts, the Board has adopted a balancing approach for determining the legality of employer conduct under § 8(a)(1).

> In effect, section 8(a)(1) could be rewritten as follows: It shall be an unfair labor practice for an employer to take action which, regardless of the absence of anti-union bias, tends to interfere with, restrain, or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks a legitimate and substantial justification such as plant safety, efficiency or discipline. Thus construed, *section 8(a)(1) requires that the Board strike a balance between the interests of the employer*—which are not specifically accorded weight in the statute but which Congress surely intended be considered in administering a statute designed to further industrial peace and efficiency—*and the interests of the employees* in a free decision concerning their collective bargaining activities.

R. GORMAN, BASIC TEXT ON LABOR LAW 133 (1976) (emphasis added).

See NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1293 (5th Cir. 1980) (§ 8(a)(1) "requires weighing the effect on employee rights against the employer's business justification for his actions . . . ."). To establish a violation of § 8(a)(1), it is not necessary for the general counsel to prove that particular employees were restrained, coerced, or interfered with in the exercise of their rights guaranteed them by section 7 of the Act. R. GORMAN, *supra*, at 132. The test of interference, restraint or coercion of employees is not the success or failure of the conduct, but whether it may reasonably be said to tend to interfere with the exercise of rights protected by the Act. Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).

[84]The tendency of the discharge to have an adverse effect on the employees' exercise of statutory rights could be discerned by evaluating factors such as: the timing of the supervisor's discharge in relation to other conduct, legal and illegal, which directly affects the protected activities of rank-and-file employees; the content of employer

Board should find that the discharge violates section 8(a)(1) unless the effect of the discharge is outweighed by the business justification for the employer's action.[85] It should do so regardless of whether the employer was motivated, in whole or in part, by a desire to discourage employees from engaging in protected activities.[86] In order to take into consideration the congressional determination that employers must be free to fire a supervisor who has been disloyal, the Board should approach each case in which management was aware of the discharged supervisor's active involvement in union activities with a rebuttable presumption that there was an overriding business justification for the discharge and that it was, therefore, lawful. Even if the Board finds in a particular case that the discharge of a supervisor who actively engaged in union activities was unlawful, it should carefully consider whether, on the facts, it is appropriate to compel the employer to reinstate the supervisor or whether some other remedy, such as a cease-and-desist order or back pay without reinstatement,[87] would be sufficient to accomplish the purposes of the Act.

This balancing approach has an advantage over present Board policy because it considers not merely the employees' right to be free to engage in activities protected by section 7 of the Act, but also the employer's legitimate interest in selecting and retaining loyal supervisory personnel. An analysis of the progeny of *Pioneer Drilling* suggests that too often the Board has overlooked the congressional determination that an employer must be free to discharge supervisors in furtherance of its legitimate interest in opposing unionization by lawful means. It is time for the Board to re-examine the balance it has struck between competing employer and employee interests in supervisor discharge cases.

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communications to employees about the circumstances of the supervisor's discharge; and the extent of employee awareness of the fact that a supervisor was discharged and the perceived reasons therefor.

[85]In determining the weight to be given the employer's business justification for the supervisor's discharge, the Board might consider: the degree of the supervisor's involvement in union or other similar activities; the discharged supervisor's place in the managerial hierarchy; and the needs of the particular business enterprise.

[86]*See* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1326-27 (1968) wherein the authors contend that the Supreme Court's establishment of employer motivation as an essential element in proving a violation of § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), is a "fictive formality" which obscures the fact that the Court is balancing and choosing between the rival interests of employers and employees.

[87]*Cf.* NLRB v. Brookside Industries, 308 F.2d 224 (4th Cir. 1962) (supervisor discharged in violation of § 8(a)(1) is entitled to back pay, but not to reinstatement, because of conflict of interest created by her dual status as a supervisor and as a wife of a nonsupervisory union employee).

Indiana's Victim Compensation Act: A Comparative Perspective

TIMOTHY V. CLARK*
D. ROBERT WEBSTER**

I. INTRODUCTION

The problem of crime in American society touches the life of almost every citizen. Statistics reveal its dimensions. One violent crime (murder, forcible rape, robbery, or aggravated assault) occurs every twenty-seven seconds in the United States.[1] In 1979, there were 1,178,539 violent crimes reported to law enforcement agencies.[2] In the same year, 18,254 violent crimes were reported to Indiana law enforcement agencies.[3] The Law Enforcement Assistance Administration's National Crime Survey estimated that during 1978 the instances of personal victimizations from the crimes of rape, robbery, and assault totaled 5,941,000.[4]

Only in the last two decades have American criminal justice policymakers begun to confront the ravaging health, psychological, and financial consequences to victims of violent crime. Victim compensation, defined as the "granting of public funds to persons who have been victimized by a crime of violence and persons who survive those killed by such crimes . . . ,"[5] is a systemic response to the financial consequences of crime to its victims.

This Article presents a comparative analysis of the Indiana, New York, and Minnesota victim compensation legislation, and makes recommendations for Indiana based on the experiences of the New York and Minnesota victim compensation programs. The Indiana Act is compared to the New York and Minnesota Acts because the New York Act has served as an early statutory model for many

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*Reginald Huber Smith Fellow, Legal Services Organization; J.D., Indiana University School of Law—Indianapolis, 1981.

**International Legal Department, Cummins Engine Company; J.D., Harvard University, 1971.

[1]U.S. FED. BUREAU OF INVESTIGATION, DEP'T OF JUST., UNIFORM CRIME REPORTS 5 (1979).

[2]*Id.* at 40.

[3]*Id.* at 50.

[4]U.S. LAW ENFORCEMENT ASSISTANCE AD., DEP'T OF JUST., CRIME VICTIMIZATION IN THE UNITED STATES: SUMMARY FINDINGS OF 1977-78; CHANGES IN CRIME AND TRENDS SINCE 1973, Table 1 (1979).

[5]H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 3 (1974).

jurisdictions,[6] and the Minnesota Act represents one of the most comprehensive pieces of legislation concerning victim compensation.[7]

It should also be noted that the Indiana Act provides that during 1981 a committee of the General Assembly is to review the need for the victim compensation program and submit a recommendation to the General Assembly before December 31, 1981.[8] Unless further action is taken by the General Assembly, the Violent Crime Compensation Division will be abolished as of December 31, 1982.[9] This provision exhibits a legitimate concern for fiscal prudence and administrative efficiency; nevertheless, it intimates that Indiana has yet to demonstrate a long-term commitment to state-operated victim compensation. This Article posits that victim compensation deserves a greater priority in the state public sector than is indicated in the Indiana Act.

II. The History and Justification of Victim Compensation

A brief history of victim compensation demonstrates the paucity of governmental concern for victims of crime. The earliest legal reference to victim compensation is found in the Code of Hammurabi enacted over four thousand years ago.[10] Other references are found in the Old Testament[11] and the *Iliad*.[12] Compensation of victims of crime was the exception, however; most ancient legal codes recognized the principle of restitution by the offender to the victim rather than compensation by state indemnification of crime victims.[13]

The modern revival of victim compensation is generally credited to the British social activist Margaret Fry who in the 1950's advocated legislation throughout the United Kingdom to compensate the victims of crime.[14] These ideas came to fruition in victim compensation legislation in New Zealand in 1963,[15] Great Britian in 1964,[16] and

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[6]*See generally* Edelhertz, Geis, Chappell, & Sutton, *Public Compensation of Victims of Crime: A Survey of the New York Experience* (pts. 1-2), 9 Crim. L. Bull. 5, 101 (1973) [hereinafter cited as Edelhertz].

[7]*See generally* Note, *The Minnesota Crime Victims Reparation Act: A Preliminary Analysis*, 2 Wm. Mitchell L. Rev. 187 (1976) [hereinafter cited as Note].

[8]Ind. Code § 16-7-3.6-19 (Supp. 1980).

[9]*Id.*

[10]Code of Hammurabi §§ 21-22 (C. Edwards trans. 1904).

[11]*Exodus* 21:18-19.

[12]Homer, Iliad, Bk. IX, at 429 (A. Murray trans. 1924).

[13]R. Meiners, Victim Compensation 7 (1978) [hereinafter cited as Meiners].

[14]*Id.* at 9.

[15]Criminal Injuries Compensation Act, Pub. Act No. 134, 1963-1 Stat. N.Z. 861.

[16]Home Office, Compensation for Victims of Crimes of Violence, Cmd. No. 2323 (1964) as modified by the House of Commons, 697 H.C. Written Answers (5th ser.) 89 (1964). *See generally* 78 Harv. L. Rev. 1683 (1965).

many Australian states[17] and Canadian provinces in 1967.[18]

California in 1965 became the first American state to adopt victim compensation legislation.[19] New York was the second state to adopt victim compensation legislation with the program becoming effective in 1967.[20] Presently, thirty states and the Virgin Islands have some form of victim compensation.[21] In general, victim compensation in these states applies only to the personal injuries of victims of violent crime. No American jurisdiction compensates a victim for general property losses as a result of such crime.[22]

Various justifications for victim compensation have been offered by commentators during this period of growth of state programs. The two most commonly offered justifications suggest that the state has a duty or obligation to operate victim compensation programs. The first holds that the state has assumed responsibility for the protection of society by exercising its authority to apprehend and prosecute criminal offenders and that it must compensate victims of crime when it breaches this obligation.[23] The second rationale is based upon community welfare. It holds that the state has a moral duty to assist victims of crime just as it financially assists some qualified citizens through social security, unemployment, and workmen's compensation programs.[24]

Several other justifications for state-operated victim compensation programs have been advanced. The shared risk rationale, based on an insurance analogy, suggests that taxes paid by the citizenry serve as premiums for the victim compensation program and benefits provided to claimants act as indemnity for injuries due to criminal victimization.[25] The political-public interest rationale simply

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[17]*See, e.g.*, Criminal Injuries Compensation Act, Pub. Act. No. 14, 1967 Stat. N.S.W.

[18]*See, e.g.*, Criminal Injuries Compensation Act, ch. 84, 1967 Sask. Stat. 382.

[19]Act of July 15, 1965, ch. 1395, 1965 Cal. Stats. 3315 (repealed 1969) (current version at CAL. GOV'T CODE §§ 13957-13974 (West Supp. 1980)).

[20]Act of Aug. 1, 1966, ch. 894, 1966 N.Y. Laws 2596 (codified at N.Y. EXEC. LAW §§ 620-635 (McKinney 1972 & Supp. 1972-1980)).

[21]*See generally* Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUD. 485 (1980) for an overview of the organization and operation of compensation programs currently in effect.

[22]D. CARROW, CRIME VICTIM COMPENSATION 17-18 (Nat'l Inst. of Justice Program Models, 1980) (hereinafter cited as CARROW).

[23]*See, e.g.*, Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 224 (1964); Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim*, 47 NOTRE DAME LAW. 88, 93 (1971).

[24]*See, e.g.*, MEINERS, *supra* note 13, at 5; Brooks, *The Case for Creating Compensation Programs to Aid Victims of Violent Crimes*, 11 TULSA L.J. 477, 483-85 (1976).

[25]*See, e.g.*, Note, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 228 (1978); Comment, *Compensation to Victims of Violent Crimes*, 61 NW. U.L. REV. 72, 84b (1966).

postulates that because many members of the public want compensation for victims of crime, legislatures are obliged to comply with this desire.[26] Under the anti-alienation rationale, it is asserted that victims of crime will feel alienated from the community unless public concern is exhibited toward victims by financial assistance.[27] The inadequacy-of-civil-action rationale holds that the vast majority of criminal offenders are not apprehended, and even if apprehended, do not have the financial means to pay for their damages resulting from victimization; hence, the state should intervene to compensate the victim.[28] Perhaps the most fundamental rationale for public compensation to the victim of violent crime is its essential morality. Victims have long suffered in two distinct senses: actual victimization and public indifference. Governmental largesse is the proper corrective.[29]

Of the three Acts discussed here, only the New York Act expresses a philosophical rationale. It is predicated on the grace of government rationale[30] which holds that out of a sense of mercy, the state should intervene to assist a victim of crime in need. In reality, nothing more substantial than a charitable concern for the plight of the victim underlies the sentiment.

III. Legislative Histories of the Indiana, New York, and Minnesota Victim Compensation Acts

The Indiana Compensation for Victims of Violent Crimes Act[31] was passed by the Indiana General Assembly on February 27, 1978 over Governor Bowen's veto of the previous legislative session. The Act called for the immediate establishment of a victim compensation program,[32] but from its inception, the Indiana program has had a precarious existence.

The Violent Crime Compensation Division was originally a component of the Indiana Rehabilitation Services Board.[33] Its sole funding source was the Violent Crime Victims Compensation Fund derived

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[26]*See, e.g.*, Carrow, *supra* note 22, at 6; Brooks, *supra* note 24, at 485-86.

[27]*See, e.g.*, S. Schafer, Compensation and Restitution to Victims of Crime 26 (2d ed. 1970).

[28]*See, e.g.*, Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 Geo. Wash. L. Rev. 446, 450-53 (1973); Note, *supra* note 23, at 93.

[29]*See, e.g.*, Note, *Compensating Victims of Crime: Evolving Concept or Dying Theory?*, 82 W. Va. L. Rev. 89, 96 (1979).

[30]N.Y. Exec. Law § 620 (McKinney 1972).

[31]Act of Feb. 27, 1978, Pub. L. No. 358, 1977 Ind. Acts 22 (1978) (codified at Ind. Code §§ 16-7-3.6-1 to -20 (Supp. 1980)).

[32]Act of Feb. 27, 1978, Pub. L. No. 358, § 6, 1977 Ind. Acts 22, 35 (1978).

[33]*Id.* § 1, at 22-23 (current version at Ind. Code § 16-7-3.6-2 (Supp. 1980)).

from court costs in Class A misdemeanors and all felony convictions.[34] The first claim was filed on June 23, 1978.[35] Within a year, 154 claims were filed with the Division, and sixteen awards were rendered totaling $59,244.21.[36] During this period, administrative expenditures were $76,399.84.[37]

In 1979, fiscal considerations[38] prompted the General Assembly to appropriate only $1.00 for administrative expenses for fiscal 1980.[39] Effective June 15, 1979, the Violent Crime Compensation Division ceased processing all claims.[40] At that time 101 claims were pending.[41] From mid-1979 until early 1980, the status of the victim compensation program was uncertain. During this period, the Indiana State Board of Health partially filled this void by receiving current claims.[42]

In the 1980 session, the General Assembly, with the Governor's approval, amended the Act by appropriating $50,000 from the general fund for administrative expenses and by transferring administration of the program to the Indiana Industrial Board.[43] Thirty days after the amendment became law, the Violent Crime Compensation Division began operating within the Indiana Industrial Board under the direction of Robert McNevin.[44]

The stimulus for victim compensation legislation in New York was the brutal killing of a "good samaritan" who was assisting several elderly women under attack.[45] Enacted on August 1, 1966, the legislation established a Crime Victims Compensation Board to begin operating in March, 1967.[46] The New York legislation was a "landmark effort" in the judgment of many commentators.[47] In time,

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[34]Act of Feb. 27, 1978, Pub. L. No. 358, § 1, 1977 Ind. Acts 22, 29-30 (1978) (current version at IND. CODE § 16-7-3.6-17 (Supp. 1980)).

[35][Feb., 1978-June, 1979] IND. VIOLENT CRIME COMPENSATION DIV. ANN. REP. 4 [hereinafter cited as ANNUAL REPORT].

[36]*Id.* at 5.

[37]*Id.* at 8.

[38]Interview with Judith Palmer, Executive Assistant to the Governor, and Robert McNevin, Director of the Violent Crime Compensation Division of the Indiana Industrial Board, in Indianapolis (April 17, 1980) [hereinafter cited as Interview].

[39]Act of April 10, 1979, Pub. L. No. 306, § 2, 1979 Ind. Acts 1514, 1577 (1979).

[40]Interview, *supra* note 38.

[41]ANNUAL REPORT, *supra* note 35, at 14.

[42]Interview, *supra* note 38.

[43]Act of Feb. 28, 1980, Pub. L. No. 117, §§ 3, 7, 1980 Ind. Acts 1311, 1313 (1980) (codified at IND. CODE §§ 16-7-3.6-2 to -20 (Supp. 1980)).

[44]Interview, *supra* note 38.

[45]Edelhertz (pt. 1), *supra* note 6, at 8.

[46]Act of Aug. 1, 1966, ch. 894, 1966 N.Y. Laws 2596 (codified at N.Y. EXEC. LAW §§ 620-635 (McKinney 1972 & Supp. 1972-1980)).

[47]Edelhertz (pt. 1), *supra* note 6, at 27.

it "would provide guidelines for other state programs, and the experience in New York State would provide empirical data for adjudicating ideological questions related to victim compensation."[48]

Minnesota initially had a "good samaritan" law which provided limited compensation to innocent persons attempting to aid the victim of a crime, or attempting to apprehend or arrest a suspected criminal.[49] After numerous efforts following the expiration of this law in 1971, broader victim compensation legislation establishing a Crime Victims Reparation Board was enacted on April 11, 1974.[50]

IV. Victim Compensation Programs in Action

A. Terminology

The Indiana Act applies only to "violent crimes" defined as a "Class A misdemeanor or any felony [resulting] in bodily injury or death."[51] The definition of "crime" in the New York[52] and Minnesota[53] Acts is virtually the same. Each Act defines "victim" in the same manner, that is, as one who suffers bodily injury or death as a result of a crime.[54] The Indiana Act defines "claimant" as a victim filing an application for assistance under the Act including the parent, surviving spouse, legal dependent, or personal representative of the vic-

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[48]*Id.*

[49]Act of June 6, 1969, ch. 1018, 1969 Minn. Laws 2044 (expired July 1, 1971).

[50]Act of April 11, 1974, ch. 463, 1974 Minn. Laws 1132 (codified at Minn. Stat. Ann. §§ 299B.01-16 (West Supp. 1980)).

[51]Ind. Code § 16-7-3.6-1(b) (Supp. 1980). Crimes involving the operation of a motor vehicle are not considered "violent crimes" unless the offense was intentional. *Id.* § 16-7-3.6-1(b)(1)-(4).

[52]N.Y. Exec. Law § 621(3) (McKinney 1972).

[53]Minn. Stat. Ann. § 299B.02(5)(a) (West Supp. 1980).

[54]Ind. Code § 16-7-3.6-1(e) (Supp. 1980); Minn. Stat. Ann. § 299B.02(9) (West Supp. 1980); N.Y. Exec. Law § 621(5) (McKinney 1972). The Indiana Act uses the term "individual" rather than "person" as is used in the New York and Minnesota Acts. The Indiana Act also speaks of injuries or death as "a result of a violent crime," whereas both the New York and Minnesota Acts speak of a "direct result of a crime." This language in the Indiana Act indicates a broader causation element than in the New York and Minnesota Acts. Also, it is not clear why Ind. Code § 16-7-3.6-1(d) (Supp. 1980) defines "person" as being a sole proprietorship, partnership, corporation, association, fiduciary, or individual. With the exception of the individual, the enumerated parties do not meet the eligibility criteria for benefits under the Indiana Act because these parties, as legal entities, cannot be victims of violent crime, would not have a surviving spouse or dependent child, and cannot be injured or killed under the eligibility criteria of the Indiana Act. There seems to be little meaning and utility in so defining a "person" under the Indiana Act. Neither the New York nor the Minnesota Act contains such a confusing definition.

tim.[55] The New York[56] and Minnesota[57] Acts define "claimant" as a person filing a claim for assistance under the Act. Parties are specified elsewhere.[58]

B. Administration

The original 1977 legislation placed the Indiana victim compensation scheme within the Indiana Rehabilitation Services Board as the Violent Crime Compensation Division.[59] The 1980 Indiana General Assembly enacted the legislation currently in force which transferred the Violent Crime Compensation Division from the Indiana Rehabilitation Services Board to the Indiana Industrial Board.[60] The Indiana Industrial Board presently consists of seven members appointed by the governor with one being designated chairman.[61]

New administrative agencies were also created in New York and Minnesota to implement their victim compensation legislation. Under the New York Act, the New York Crime Victims Compensation Board was established within the state Executive Department.[62] The Minnesota Crime Victims Reparations Board was established in Minnesota to administer the victim compensation program as a component of the Department of Public Safety.[63]

Although the Indiana Violent Crime Compensation Division has powers and duties generally similar to that of the New York and Minnesota administrative bodies,[64] the latter two have significant powers not found in the Indiana Act. The powers and duties of the

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[55]IND. CODE § 16-7-3.6-1(c) (Supp. 1980).

[56]N.Y. EXEC. LAW § 621(2) (McKinney 1972).

[57]MINN. STAT. ANN. § 299B.02(3) (West Supp. 1980).

[58]*See* MINN. STAT. ANN. § 299B.03(1) (West Supp. 1980); N.Y. EXEC. LAW § 624(1), (McKinney 1972).

[59]Act of Feb. 27, 1978, Pub. L. No. 358, § 1, 1977 Ind. Acts 22-23 (1978).

[60]Act of Feb. 28, 1980, Pub. L. No. 117, § 3, 1980 Ind. Acts 1311 (1980) (codified at IND. CODE § 16-7-3.6-2 (Supp. 1980)).

[61]IND. CODE § 22-3-1-1 (1976). The chairman must be an attorney. *Id.* The full-time board has administrative jurisdiction over the Indiana Workmen's Compensation Act in addition to the Violent Crime Compensation Division as provided by the 1980 legislation. *Id.* § 22-3-1-2 (1976).

[62]N.Y. EXEC. LAW § 622(1) (McKinney Supp. 1972-1980). The board has five members who are appointed by the Governor. *Id.* One member is designated chairman by the Governor, and all members have full-time board duties. *Id.* § 622(3)-(4) (McKinney 1972).

[63]MINN. STAT. ANN. § 299B.05(1) (West Supp. 1980). The board has three members who are appointed by the Governor. *Id.* One member is designated chairman by the Governor, and all members have only part-time board duties. *Id.* § 299B.05(1), (3).

[64]IND. CODE § 16-7-3.6-4 (Supp. 1980); MINN. STAT. ANN. § 299B.06 (West Supp. 1980); N.Y. EXEC. LAW § 623 (McKinney 1972 & Supp. 1972-1980).

New York Board were initially no greater than those presently found in the Indiana Act.[65] In 1977[66] and 1979,[67] however, the original New York Act was amended to establish the Board as an aggressive advocate of victims' rights. The Board was given an advocacy role aimed at developing and promoting policies and programs which advance the rights and interests of crime victims.[68] The Board was also given the power to conduct conferences;[69] to serve as a clearinghouse for information regarding victim compensation;[70] to accept grant money to effectuate these goals;[71] and to provide counseling services to victims suffering from traumatic shock.[72] The needs of senior citizens were specifically addressed by adding the power to establish special investigative units to expedite the administration of claims by senior citizens and to encourage volunteer programs which visit the homes of older crime victims.[73] The Minnesota Board has similar powers to the Indiana Board, but also has the additional duty to publicize the availability of reparations and the claims method.[74]

The additional powers and duties of the New York and Minnesota administrative bodies should be given special consideration for inclusion in the Indiana Act. The New York legislation has created an administrative body with wide ranging powers to assist the victims of crime. This wholehearted effort to aid victims of crime is noteworthy in that a state government has understood that victims of crime suffer from more than financial disability. The New York program offers a comprehensive package of services well-suited to assist the victims of crime. Although these additional responsibilities would require a larger administrative staff, Indiana policymakers should consider their adoption in order to provide more comprehensive services to victims.

C. Eligibility for Reparations

The eligibility criteria for victim compensation in each state are

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[65]Act of Aug. 1, 1966, ch. 894, § 1, 1966 N.Y. LAWS 2596, 2597-98 (codified at N.Y. EXEC. LAW § 623(1)-(8) (McKinney 1972)).

[66]Act of July 27, 1976, ch. 952, § 2, 1976 N.Y. LAWS 2010 (codified at N.Y. EXEC. LAW § 623(21) (McKinney Supp. 1972-1980)).

[67]Act of July 5, 1979, ch. 415, § 3, 1979 N.Y. LAWS 936, 937 (codified at N.Y. EXEC. LAW § 623(9)-(20) (McKinney Supp. 1972-1980)).

[68]N.Y. EXEC. LAW § 623(10)-(16) (McKinney Supp. 1972-1980).

[69]*Id.* § 623(17).

[70]*Id.* § 623(18).

[71]*Id.* § 623(19).

[72]*Id.* § 623(21).

[73]*Id.* § 623(9).

[74]MINN. STAT. ANN. § 299B.06(1)(d) (West Supp. 1980).

generally similar but there are certain differences. The Indiana Act includes seven categories of persons eligible for compensation: (1) a victim of a violent crime; (2) a surviving spouse or dependent child of a victim of a violent crime who died as a result of that crime; (3) any other legally dependent person of a victim of a violent crime who dies as a result of the crime; (4) the "good samaritan" who is injured or killed while trying to prevent a violent crime or to apprehend a violent offender; (5) a surviving spouse or dependent child of a "good samaritan" who dies as a result of a violent crime; (6) a person legally dependent for principal support upon a "good samaritan" who dies as a result of a violent crime; or (7) a person injured or killed while aiding "(i) a law enforcement officer in the performance of his lawful duties; or (ii) a member of a fire department who is being obstructed from performing his lawful duties."[75]

The New York Act sets out eligibility standards similar to the Indiana Act but with certain variations. For example, the New York Act specifically provides that a parent of a victim who died as a result of a violent crime is eligible for assistance.[76] The Indiana Act provides assistance to a parent only if he or she was a dependent of the victim.[77] The New York Act, however, does not specifically provide for categories (4)-(7) listed above.

The same parties eligible for assistance under the Indiana Act are eligible under the Minnesota Act with the following variations. The spouse or parent must be a "dependent" of the deceased victim, or included within the estate of a deceased victim, to be eligible for assistance.[78] Further, any person incurring economic loss by purchasing any product, services, or accomodations for a victim is eligible for assistance[79] when such items are deemed to be medical, psychological, or rehabilitative expenses.[80] The estate of a deceased victim, a guardian, guardian ad litem, conservator, or authorized agent of a victim or other persons are also eligible for assistance under the Minnesota Act.[81]

Each Act also specifies which persons are ineligible for compensation. Under the Indiana Act, the offender, an accomplice, or a member of the offender's family are ineligible.[82] If the victim is a legal nonspousal dependent of the offender, however, "compensation

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[75]IND. CODE § 16-7-3.6-5(a) (Supp. 1980).
[76]N.Y. EXEC. LAW § 624(1)(b) (McKinney 1972).
[77]IND. CODE § 16-7-3.6-5(a)(3) (Supp. 1980).
[78]MINN. STAT. ANN. § 299B.03(1)(b), (c) (West Supp. 1980).
[79]*Id.* § 299B.03(1)(d).
[80]*Id.* § 299B.02(7).
[81]*Id.* § 299B.03(1)(c), (e).
[82]IND. CODE § 16-7-3.6-5(b) (Supp. 1980).

may be awarded where justice requires."[83] The New York[84] and Minnesota[85] Acts also exclude the offender or an accomplice. The New York Act excludes a member of the offender's family, specifically defining a family member as "(a) any person related to . . . [the offender or an accomplice] within the third degree of consanguinity or affinity, (b) any person maintaining a sexual relationship with . . . [the offender or an accomplice], or (c) any person residing in the same household with . . . [the offender or an accomplice]."[86] The Minnesota Act excludes a victim who is a "spouse of or a person living in the same household with the offender or his accomplice or the parent, child, brother or sister of the offender or his accomplice" except where the Board determines that the "interests of justice" otherwise require reparations.[87] Some interpretation problems may arise under the Indiana Act because the Act does not define "family" or personal relationships as in the New York and Minnesota Acts. Eligibility for the offender's legal nonspousal dependent, however, provides a sound basis for including the offender's dependent child within the financial protection of the Act when the dependent child is victimized by the violent acts of the offending parent. The New York definition of "family" is restrictive, whereas the Indiana and Minnesota provisions are more liberal by providing compensation to those with the greatest need as in the case of a dependent child criminally victimized by an offending parent.

The general family member exclusion in all three Acts, however, can be criticized because it denies benefits to those persons within the ambit of the victim compensation concept. The general family member exclusion is based upon a policy of preventing fraud and precluding benefits from accruing to the offender as a result of his criminal conduct. A leading commentator, W.F. McDonald, has criticized this policy:

> The requirement that there be no personal relationship between the offender and the victim disqualifies large numbers of persons who are victims of violent crimes. Since at least 30 to 40% of all violent crimes involve members of the same family, it is difficult to understand the rationale for such a provision, if serving the needs of the victims is the actual objective of the program.[88]

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[83] *Id.*

[84] N.Y. EXEC. LAW § 624(2) (McKinney 1972).

[85] MINN. STAT. ANN. § 299B.03(2)(d) (West Supp. 1980).

[86] N.Y. EXEC. LAW § 621(4) (McKinney 1972).

[87] MINN. STAT. ANN. § 299B.03(2)(c) (West Supp. 1980).

[88] W. MCDONALD, CRIMINAL JUSTICE AND THE VICTIM 273 (1976).

Indiana policymakers should consider a broader eligibility standard similar to the Minnesota standard which not only covers the legal nonspousal dependent but also any related party when the interests of justice require compensation. This broad standard is the fairest policy because justice may require that the spouse or relative of the criminal offender receive benefits in exceptional cases. Concern for the needs of a victim should outweigh any undue concern for the prevention of collusive fraud.

The Indiana Act also provides that an award may be denied to a victim who contributed to their own injury or death.[89] If, however, the victim's contribution resulted from conduct attributable to preventing a crime from occurring, or to apprehending a person who committed a crime in the victim's presence, an award may still be rendered.[90] Although the New York and Minnesota Acts have provisions concerning contributory misconduct of the victim, both statutes operate on a more liberal comparative negligence principle rather than the contributory negligence principle which underlies the Indiana statute. The New York statute provides that if the victim contributed to his injury, the award must be reduced or the claim rejected altogether.[91] The Minnesota statute likewise provides that reparations must be reduced to the extent that it is determined reasonable because of the victim's contributory misconduct.[92] Thus, if the misconduct is excusable for any reason, the award need only be reduced and not denied altogether. These provisions in the New York and Minnesota Acts allow for a more equitable result in determining the effect of contributory misconduct upon a compensation award. The Indiana Act should be based on a similar standard to avoid the potentially harsh results that may occur under the existing provision.

D. Statutory Requisites

The Indiana Act requires that the victim have been a resident of Indiana at the time the violent crime was committed and that the violent crime have been commited in Indiana.[93] The New York[94] and Minnesota[95] Acts do not have a residency requirement for the victim, although both Acts require that the crime have been committed within the state. Although the residency requirement contained in

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[89]IND. CODE § 16-7-3.6-11(c) (Supp. 1980).

[90]*Id.*

[91]N.Y. EXEC. LAW § 631(5) (McKinney 1972).

[92]MINN. STAT. ANN. § 299B.04(2) (West Supp. 1980).

[93]IND. CODE § 16-7-3.6-6(a) (Supp. 1980).

[94]N.Y. EXEC. LAW § 621(3) (McKinney 1972).

[95]MINN. STAT. ANN. § 299B.02(5)(a)(i) (West Supp. 1980).

the Indiana Act may be considered reasonable because it is the state that provides compensation, it can be argued that on the basis of reciprocity, the Act should provide for assistance to an out-of-state victim when the victim's state of residence has a similar victim compensation scheme.[96]

The Indiana Act requires that an application for compensation be filed within ninety days of the commission of the crime.[97] The Violent Crime Compensation Division, however, may grant an extension of time for good cause shown by the claimant.[98] No application under the Act may be filed after one year from the date on which the crime was committed.[99] The New York Act requires that the claim be filed not later than one year after the occurrence of the crime or the death of the victim.[100] The New York Board may extend the time for filing upon good cause shown by the claimant but the extension is limited to two years beyond the occurrence of the crime.[101] The Minnesota Act stipulates that the claim be filed within one year of the victim's injury or death but "if it could not have been made within that period, then the claim can be made within one year of the time when a claim could have been made."[102]

Although the Indiana provision is not objectionable, the Minnesota provision is preferable. Injuries caused by crime victimization may not be diagnosed until some time after the crime. If such conditions arise after the filing period, the victim has the burden of showing good cause for delay. It is more reasonable to allow the victim a liberal filing period because the discovery of injuries is not subject to such precise timing.

The Indiana Act further stipulates that no award shall be allowed unless the violent crime was reported to a law enforcement officer within forty-eight hours after the occurrence of the crime and the claimant fully cooperated with law enforcement personnel in solving the crime.[103] The Act states, however, that if the Violent

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[96]*But cf.* Ostrager v. State Bd. of Control, 99 Cal. App. 3d 1, 160 Cal. Rptr. 317 (1979), *appeal dismissed* 101 S. Ct. 53 (1980) (Stevens, J. would have noted probable jurisdiction and set the case for oral argument). In *Ostrager*, a New York resident shot in California challenged the residency requirement of the California Act. The California Court of Appeals rejected arguments against the residency requirement's validity based upon the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution. 99 Cal. App. 3d at 5, 7-8, 160 Cal. Rptr. 319, 321.

[97]IND. CODE § 16-7-3.6-6(b) (Supp. 1980).

[98]*Id.*

[99]*Id.*

[100]N.Y. EXEC. LAW § 625(2) (McKinney Supp. 1972-1980).

[101]*Id.*

[102]MINN. STAT. ANN. § 299B.03(2)(e) (West Supp. 1980).

[103]IND. CODE § 16-7-3.6-7 (Supp. 1980).

Crime Compensation Division finds "compelling reasons for the failure to report to or to cooperate with law enforcement officials, and justice requires," the above requirement may be suspended.[104]

The New York Act only allows an award if police records indicate that the crime was reported to the proper authorities within one week after the occurrence of the crime unless the Board, upon good cause shown, finds that the delay was justified.[105] The Minnesota Act rejects an award when "the crime was not reported to the police within five days of its occurrence or, if [the crime] could not reasonably have been reported within that period, within five days of the time when a report could reasonably have been made."[106] It also provides that no award shall be allowed if the victim or the claimant failed or refused to cooperate fully with law enforcement personnel.[107] The Indiana two-day reporting requirement may be considered reasonable, but as in the case of the short filing period in Indiana, claimants may be forced into showing compelling reasons for failing to report within the two-day period. This is a burdensome provision when compared to the five-day requirement in Minnesota and the one-week requirement in New York. The Minnesota provision is the most reasonable of the three in allowing the time limitation to begin when the report could reasonably have been made.

E. Benefits

1. Coverage.—The Indiana Act provides that compensation is to be awarded for "(1) expenses actually and reasonably incurred as a result of the bodily injury or death of the victim; (2) loss of income resulting directly from the bodily injury; (3) pecuniary loss to the legal dependents of the deceased victim; and (4) other actual expenses resulting from the bodily injury or death of the victim"[108] which are deemed reasonable. The New York Act uses substantially similar language in describing the extent of benefits provided under its victim compensation program. Compensation is provided for out-of-pocket loss, defined as "unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based."[109] The Indiana and New York Acts provide benefits for similar expenses and losses incurred by the victim. These expenses and losses can be summarized as medical expenses incurred

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[104] *Id.*

[105] N.Y. EXEC. LAW § 631(1)(c) (McKinney Supp. 1972-1980).

[106] MINN. STAT. ANN. § 299B.03(2)(a) (West Supp. 1980).

[107] *Id.* § 299B.03(2)(b).

[108] IND. CODE § 16-7-3.6-8(b)(1)-(4) (Supp. 1980).

[109] N.Y. EXEC. LAW § 626 (McKinney Supp. 1972-1980).

as a result of physical injury or death to the victim;[110] loss of income;[111] pecuniary losses, such as funeral and burial expenses, incurred by the legal dependents of a victim;[112] and other actual expenses resulting from the physical injury or death of a victim.[113]

The Minnesota Act, however, is more inclusive than the victim compensation act of any other state.[114] The Act generally provides that compensation is to be awarded for economic loss, that is, "actual detriment incurred as a direct result of injury or death."[115] The Minnesota Act specifically covers expenses incurred from medical and psychiatric services and products necessary for the victim's rehabilitation;[116] income which the victim would have earned in the absence of the injury;[117] and the cost of child care and household services necessary to substitute for those the victim would have performed but for the injury.[118] In the event of a victim's death, compensable expenses under the Minnesota Act include reasonable funeral expenses;[119] expenses for medical and psychiatric services and products incurred prior to death and for which the estate is liable;[120] loss of support;[121] and substitute child care and household services.[122]

The Minnesota Act not only uses more explicit statutory language in defining the kinds of benefits provided to victims, but covers more expenses and losses incurred by the victim. Under the Minnesota Act, there is little doubt as to which specific losses or expenses are covered. The Indiana and New York Acts will unfortunately require difficult administrative decisions to specify the particular losses and expenses covered under those Acts. As noted above, the Minnesota Act provides benefits for expenses incurred for rehabilitative services, psychological and psychiatric services, and substitute child care or household services.[123] Although they are

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[110]IND. CODE § 16-7-3.6-8(a) (Supp. 1980); N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1972-1980).

[111]IND. CODE § 16-7-3.6-8(b)(2) (Supp. 1980); N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1972-1980).

[112]IND. CODE § 16-7-3.6-8(b)(3) (Supp. 1980).

[113]*Id.* § 16-7-3.6-8(b)(4) (Supp. 1980); N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1972-1980).

[114]Note, *supra* note 7, at 196.

[115]MINN. STAT. ANN. § 299.02(7) (West Supp. 1980).

[116]*Id.* § 299B.02(7)(a)(i)-(ii).

[117]*Id.* § 299B.02(7)(a)(iii).

[118]*Id.* § 299B.02(7)(a)(iv).

[119]*Id.* § 299B.02(7)(b)(i).

[120]*Id.* § 299B.02(7)(b)(ii).

[121]*Id.* § 299B.02(7)(b)(iii).

[122]*Id.* § 299B.02(7)(b)(iv).

[123]*Id.* § 299B.02(7).

not specifically mentioned in the Indiana Act, it can be argued that the broad language of the catch-all phrase in Indiana Code section 16-7-3.6-8(b)(4) regarding "other actual expenses resulting from the bodily injury or death of the victim" would cover these expenses.[124] It is urged that such coverage be provided to the victim because it would truly compensate the victim for actual expenses resulting from bodily injury. Further, the term "injury" in the Minnesota Act includes both bodily injury and mental or nervous shock; therefore, the traditional element of damages known to tort law as "pain and suffering" is also covered.[125] It is submitted that these psychological injuries are as real and at least as damaging to a victim of a violent crime as physical injuries. Indiana should adopt a policy of including "pain and suffering" as compensable items.

2. Emergency Benefit Awards.—Each of the three victim compensation programs provide for emergency awards to victims if two conditions are met—the victim will suffer a hardship without an emergency award and a final award will probably be made to the victim.[126] Each Act requires that the sum of the emergency award be deducted from the final award to the victim.[127] The Indiana Act provides for an emergency award not to exceed $500.[128] The New York Act provides for one or more emergency awards not to individually exceed $500 and the total amount of the emergency awards not to exceed $1,500.[129] The Minnesota Act limits neither the number nor amount of the emergency awards.[130]

Indiana should consider adopting the unlimited Minnesota emergency award provision or the less restrictive New York provision. Immediate medical expenses may quickly consume an emergency award. Because the award is deductible from the final award or recoverable from the claimant where no final award is made, there is little reason to limit emergency awards either in number or

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[124]IND. CODE § 16-7-3.6-8(b)(4) (Supp. 1980).

[125]MINN. STAT. ANN. § 299B.02(8) (West Supp. 1980). As to the difficulty of determining psychological injuries, the Minnesota Note supplies a useful consideration: "Because this [mental and nervous shock] provision parallels the language permitting recovery for medical expenses for bodily injury, the same factors used by the [Minnesota] Board in considering what is 'reasonable' and 'necessary' for the treatment of bodily injury should be equally applicable to recovery for mental injury-related expenses." Note, *supra* note 7, at 217.

[126]IND. CODE § 16-7-3.6-13 (Supp. 1980); MINN. STAT. ANN. § 299B.06(2)(g) (West Supp. 1980); N.Y. EXEC. LAW § 630 (McKinney Supp. 1972-1980).

[127]IND. CODE § 16-7-3.6-13 (Supp. 1980); MINN. STAT. ANN. § 299B.09 (West Supp. 1980); N.Y. EXEC. LAW § 630(c) (McKinney Supp. 1972-1980).

[128]IND. CODE § 16-7-3.6-13 (Supp. 1980).

[129]N.Y. EXEC. LAW § 630(a)-(b) (McKinney Supp. 1972-1980).

[130]MINN. STAT. ANN. § 299B.06(2)(g) (West Supp. 1980).

amount, especially since financial hardship is a condition of receiving the emergency award. Another reason for considering a more liberal emergency award provision in the Indiana Act is that final awards are only paid twice a year, that is, within thirty days after the award is computed either on July 31 or January 31 of the calendar year.[131] This delayed payment procedure could work a severe hardship on claimants.

F. Limitations on Recovery

The Indiana Act places the most restrictive financial limitations on the amount of benefits which a victim can be awarded. Under the Indiana Act, an award to a claimant cannot exceed $10,000 and will not cover the first $100 of the claim.[132] A similar minimum financial loss requirement in the New York Act, however, was repealed in 1976.[133] The New York Act also does not limit the amount of the award for medical expenses,[134] but the Act does provide that no award for loss of earnings or support can exceed $250 per week or an aggregate of $20,000.[135] Under the Minnesota Act, reparations are reduced by the first $100 of economic loss,[136] and "reparations paid to all claimants suffering economic loss as the result of an injury or death of any one victim shall not exceed $25,000."[137]

1. Minimum Loss Requirements.—The minimum loss requirements in the Indiana and Minnesota Acts have been attacked on several grounds. It is argued that such requirements are inequitable toward low-income people for whom a loss of less than $100 may be a great sum; the requirements encourage "padding" of claims; victims with losses approximating $100 would still submit

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[131]IND. CODE § 16-7-3.6-17 (Supp. 1980).

[132]*Id.* § 16-7-3.6-12(a).

[133]Act of Aug. 1, 1966, ch. 894, § 1, 1966 N.Y. Laws 2596, 2599 (repealed 1976). Although the minimum loss provision in the New York legislation has been repealed, a controversial "serious financial hardship" provision remains in the Act. It has been roundly criticized by many commentators and, fortunately, was not adopted in either Indiana or Minnesota. The provision maintains that if the New York Board finds that a claimant will not suffer "serious financial hardship" as a result of losses and expenses, then the Board "shall deny an award." N.Y. EXEC. LAW § 631(6) (McKinney 1972). The New York Board itself has argued for repeal of this provision, noting the difficulty of determining "serious financial hardship." *See* Edelhertz (pt. 2), *supra* note 6, at 112; Note, *Compensation for Victims of Crimes of Violence—New York Executive Article 22*, 31 ALB. L. REV. 120, 124 (1967).

[134]N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1972-1980).

[135]*Id.* § 631(3).

[136]MINN. STAT. ANN. § 299B.04(2) (West Supp. 1980).

[137]*Id.* § 299B.04(3). Minnesota originally had a maximum financial limitation of $10,000. Act of April 11, 1974, ch. 463, § 4, 1974 Minn. Laws 1132, 1136 (amended 1977).

the claims and these claims will still be processed to a certain extent; victims with less than $100 loss will still have knowledge concerning the commission of the crime; and such victims would have knowledge that would enhance the public perception and awareness of victim compensation programs.[138] There is also substantial evidence that the minimum loss requirement excludes many victims from the benefits of a victim compensation program. In a comprehensive study of victim compensation programs throughout the nation, Deborah M. Carrow found "the financial burden of medical expenses and loss of income is relatively small for most victims. Generally, medical costs are less than $100; average loss of income due to victimization is also less than $100."[139] James Garofalo and L. Paul Sutton estimate in their 1977 nationwide study of crime victimization that 75% of the victims with unreimbursed medical costs lost under $100[140] and 48% of the victims of violent crimes lost less than $100 in employment earnings.[141] A Minnesota report observes:

> The [minimum loss] requirement, however, does not avoid imposing a hardship. A reasonable assumption can be made that victims from middle and upper income groups will either have collateral sources of recovery, or be better able to absorb losses of less than $100. Victims from lower income groups, however, will suffer the brunt of the requirement. They form a disproportionate percentage of crime victims and are peculiarly unable to bear even small losses.[142]

Indiana policymakers should consider following the lead of New York in abolishing the minimum loss requirement. The resultant costs should not be prohibitive. A study by James Garofalo and M. Joan McDermott found that, "'dropping the minimum loss requirements . . . results in a 12 percent increase in total program cost . . . but it also results in a 187 percent increase in the number of victimizations covered by the program. . . . Lowering or abolishing the minimum loss requirements, then, acts to extend coverage without greatly increasing costs.'"[143]

2. Maximum Financial Limitations.—The Indiana Act also has the most restrictive limitation on the maximum amount recoverable

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[138]CARROW, *supra* note 22, at 50-51.

[139]*Id.* at 15.

[140]J. GAROFALO & L. SUTTON, COMPENSATING VICTIMS OF VIOLENT CRIME: POTENTIAL COSTS AND COVERAGE OF A NATIONAL PROGRAM 24 (Law Enforcement Assistance Administration Analytic Report SD-VAD-5, 1977).

[141]*Id.* at 30.

[142]Note, *supra* note 7, at 209.

[143]Garofalo & McDermott, *National Victim Compensation: Its Cost and Coverage*, 1 LAW & POL'Y Q. 439, 456-57, *quoted in* CARROW, *supra* note 22, at 163.

for a single injury or death. Fiscal considerations may require some maximum limitation on the amount of benefits provided under any victim compensation scheme operated by a governmental body in order for the program to survive financially. The goal for any state-operated victim compensation program should be to provide the most cost effective benefits while fulfilling the objectives of victim compensation. Arguments for a maximum financial limitation are that it reduces the overall program cost of victim compensation and that it is necessary for a victim compensation program to be politically acceptable.[144] Arguments against a maximum financial limitation are that high medical costs may quickly deplete an allowance under the maximum financial limitation and therefore prevent the program from fully compensating the victims of violent crimes for the expenses they actually incur.[145] As Carrow notes:

> [E]ven when medical expenses are nominal, the maximum available award could be grossly inadequate to compensate lost earnings or support. This seems especially possible where the victim was killed. These unfortunate results are most often realized where the upper limit is $5,000 or even $10,000. As legislators have gained experience with victim compensation programs and determined that program costs have turned out not to be as burdensome as expected, they have raised the upper limit.[146]

The maximum financial limitation for benefits under the Indiana victim compensation program cannot be considered excessively penurious in comparison to other American jurisdictions because most have statutory limits of $10,000 or $15,000 for victim compensation benefits.[147] Indiana policymakers, however, should consider increasing the maximum financial limitation based on the reasons outlined above. Reform could be modeled on the New York scheme which allows unlimited compensation for medical expenses incurred as a result of criminal victimization.

3. Collateral Sources and Subrogation.—The Indiana and New York Acts have similar provisions requiring that compensation awards be reduced by the amount of benefits received or to be received from collateral sources, that is, from the offender, private insurance contracts, public funds, etc.[148] The collateral source provi-

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[144]CARROW, *supra* note 22, at 58.

[145]*Id.*

[146]*Id.*

[147]*Id.* at 57.

[148]IND. CODE § 16-7-3.6-11(a)-(b) (Supp. 1980); N.Y. EXEC. LAW § 631(4) (McKinney Supp. 1972-1980).

sion in the Minnesota Act contains an important distinction. Under the Minnesota Act, benefits from a collateral source are deducted from the *economic loss* rather than from the amounts awarded.[149] This distinction has its greatest impact on victims suffering losses in excess of the maximum financial limitation on benefits under the Minnesota ($25,000)[150] and Indiana ($10,000) Acts.[151] Victims suffering these losses are in great need of assistance. If the economic loss to a Minnesota victim was $35,000 and a collateral source would cover $25,000 of this loss, the victim claimant could still recover $10,000 under the Minnesota provisions. However, if an Indiana victim suffered an out-of-pocket loss of $20,000, and $10,000 of this loss was to be covered by a collateral source, the victim would not be able to recover the other $10,000. The amount awarded under the Indiana Act cannot exceeded $10,000 and this figure must be further reduced by the amount of any benefits received from a collateral source. Indiana policymakers should consider the Minnesota collateral source provision because it more fairly compensates the victim for his or her losses resulting from a violent crime.[152]

The Acts of all three states each contain a subrogation provision, which merely provides that the state is subrogated, to the extent of compensation awarded by the state, to the victim's rights to recover for economic or pecuniary loss from a collateral source.[153] The three statutes also provide that awards under the victim compensation programs are not subject to execution or attachment by a creditor unless he provided services and products which were covered by the award.[154] The Indiana Act also provides that unpaid bills are mandatorily payable to the claimant and the creditor jointly.[155]

G. Claim Procedures

In Indiana, the Violent Crime Compensation Division employs

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[149]MINN. STAT. ANN. § 299B.02(4), .04(1) (West Supp. 1980).

[150]*Id.* § 299B.04(3).

[151]IND. CODE § 16-7-3.6-12(a) (Supp. 1980).

[152]The Indiana and Minnesota Acts both include a laudable provision that excludes as a collateral source deduction, proceeds from a life insurance policy on the deceased victim. IND. CODE § 16-7-3.6-11(a) (Supp. 1980); MINN. STAT. ANN. § 299B.02(4) (West Supp. 1980).

[153]IND. CODE § 16-7-3.6-8(c) (Supp. 1980); MINN. STAT. ANN. § 299B.10 (West Supp. 1980); N.Y. EXEC. LAW § 634 (McKinney 1972). Under the Indiana Act, the state is entitled to a lien in the amount of the award of any recovery made by or on behalf of the victim. IND. CODE § 16-7-3.6-8(d) (Supp. 1980).

[154]IND. CODE § 16-7-3.6-15 (Supp. 1980); MINN. STAT. ANN. § 299B.09 (West 1980); N.Y. EXEC. LAW § 632 (McKinney Supp. 1972-1980).

[155]IND. CODE § 16-7-3.6-12(b) (Supp. 1980). Minnesota, by statute, and New York, by practice, allow for the award to be paid directly to creditors of the claimants. MINN. STAT. ANN. § 299B.09 (West Supp. 1980); Edelhertz (pt. 1), *supra* note 6, at 37.

hearing officers who review all applications to verify proper completion.[156] Incomplete applications are returned to the applicant with a request for additional information.[157] If the application is complete, the Division must accept it and investigate the facts stated in the application to verify that all statutory requisites have been met.[158] A hearing may be held concerning the merits of the application at which time any interested person may appear and offer evidence or argument on any issue relevant to the application.[159] Fifteen days before the hearing, the claimant must be given by certified mail written notice of the date, time, place, and scope of the hearing.[160] All hearings are open to the public unless the interests of the victim or society require privacy.[161] Within ten days after the hearing, the hearing officer must issue a written determination supported by findings of fact and conclusions of law based on the records from the hearing, investigation, and application of the claimant.[162] "[A] hearing officer may not deny an award without providing the claimant with an opportunity for a hearing."[163] Within twenty-one days after receipt of the hearing officer's determination, the state or a claimant may file a written appeal with the Division Director.[164] Thereafter, the appeal is reviewed by the full Industrial Board.[165]

The New York and Minnesota procedures are different from the Indiana procedures in that they place primary decision making responsibilities on a Board member rather than on a hearing officer. In New York, victim's claims are assigned to a Board member[166] who must examine and investigate the claim.[167] A Board member may make a decision on the claim or, if unable to reach a decision based on the documents submitted in support of the claim and the investigative report,[168] he shall order a hearing where any relevant, non-privileged evidence is admissible.[169] After the hearing, the Board member must make a decision to grant or deny the claim, and file a written report stating the reasons for the decision.[170] Within thirty

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[156]IND. CODE § 16-7-3.6-9 (Supp. 1980).
[157]*Id.* § 16-7-3.6-10(a).
[158]*Id.* § 16-7-3.6-10(b). *See also* text accompanying notes 93-107 *supra*.
[159]IND. CODE § 16-7-3.6-10(c).
[160]*Id.*
[161]*Id.*
[162]*Id.* § 16-7-3.6-10(d).
[163]*Id.* § 16-7-3.6-10(g).
[164]*Id.* § 16-7-3.6-10(e).
[165]*Id.*
[166]N.Y. EXEC. LAW § 627(1) (McKinney 1972).
[167]*Id.* § 627(2).
[168]*Id.* § 627(4).
[169]*Id.*
[170]*Id.* § 627(5)-(6).

days after the receipt of the decision, the claimant or Board member may request in writing consideration of the decision by the Board.[171] The chairman must designate three members of the Board, not including the Board member who made the decision, to review the record and affirm or modify the decision.[172] This action is considered final, and the Board must file a written report stating the reasons for its decision if it differs from the decision reached by the single Board member.[173]

The Minnesota procedure is substantially similar. After assignment to a Board member and investigation of the claim, the Board member must decide the claim.[174] After the hearing, the Board member must make a decision to grant or deny the claim and file a written report stating the reasons for the decision.[175] The claimant or any Board member may, within thirty days after receipt of the decision, apply in writing for consideration of the decision by the full Board.[176] Thereafter, the Board must treat such claims as a contested case under the Minnesota rules of administrative procedure.[177]

The administrative efficiency of the Indiana victim compensation program can profit from an analysis of the experiences of New York and Minnesota. First, Indiana administrators should ensure that application forms are clearly written, easy to read, and request only essential information. In Minnesota:

> The filing of a claim . . . is straightforward. To avoid intimidation of potential claimants, only two simple forms are utilized, which include an authorization by the claimant to release all records and information relating to the incident by hospitals, doctors, and law enforcement agencies. In contrast to programs in other states, the burden is then on the Board to obtain from the claimant and other persons all information reasonably related to the validity of the claim.[178]

One of the most problematic areas of the claim procedure process is the investigation and verification of claims. The issue at this stage is observed here:

[V]ictim compensation programs can assume two related, but

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[171] *Id.* § 628(1)-(2) (McKinney Supp. 1972-1980).
[172] *Id.* § 628(3).
[173] *Id.*
[174] MINN. STAT. ANN. § 299B.07(1)-(3) (West Supp. 1980).
[175] *Id.* § 299B.07(4)-(5).
[176] *Id.* § 299B.08(1)-(2).
[177] *Id.* § 299B.08(3).
[178] Note, *supra* note 7, at 197.

> different approaches in this phase of the claims process: they may simply confirm the information furnished in the claim application, placing the burden of providing information with the applicant; or they may obtain the bulk of the information needed to process the claim through their own efforts, requiring only that the applicant provide the basic information necessary to allow the acquisition of the additional information. . . .[179]

The New York program uses the first procedure employing a two-stage information gathering process—the original application requests minimal information, but additional forms are sent out for more detailed information.[180] As noted earlier, the Minnesota program employs the second procedure which only requests basic information;[181] additional information must be gathered by the Minnesota Board.[182] The advantage of the Minnesota procedure is that it is less burdensome to the victim. The advantage of the New York procedure is that it is less burdensome to the victim compensation program administration. The decision as to which procedure to use should depend upon cost factors, work load, and interest in providing the maximum assistance to the victim. Evidence from New York indicates the consequences of placing the verification burden on the claimant. In New York, it is reported that the Board disallows at least 50% of the claims because of inadequate or incomplete information concerning the claimant's application.[183]

H. Attorney Involvement

The role of attorneys in the victim compensation process has been disputed. Proponents have urged that attorney involvement promotes procedural compliance by claimants and more accurate interpretation of the applicable statutes.[184] Opponents contend that attorney involvement produces too many legalistic and burdensome formalities for the program, complicates rather than facilitates compensation to the victim, and disadvantages those without counsel.[185] Each of the statutes under consideration allows claimants to be represented by counsel.[186]

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[179]CARROW, *supra* note 22, at 127-28.

[180]*Id.* at 129.

[181]Note, *supra* note 7, at 197.

[182]*Id.*

[183]W. MCDONALD, *supra* note 88, at 274.

[184]CARROW, *supra* note 22, at 62.

[185]*Id.*

[186]IND. CODE § 16-7-3.6-14 (Supp. 1980); MINN. STAT. ANN. § 299B.071 (West Supp. 1980); N.Y. EXEC. LAW § 623(3) (McKinney Supp. 1972-1980).

In Indiana, attorney fees are included in the award to the claimant as determined by the Division. The Indiana provision specifically states that attorney fees may not exceed 15% of an award of less than $5,000, nor 10% of an award not less than $5,000 nor more than $10,000.[187] Neither the New York nor the Minnesota Acts are as specific as the Indiana provision concerning attorney fees. The New York program allows attorney fees to be a part of the award to the claimant.[188] The Minnesota Act does not allow attorney fees as a part of the award, but the Board may limit the fees charged by the attorney for representing a claimant before the Board.[189] The Indiana provision regarding attorney fees is reasonable because the provision cannot be considered a financial boon for attorneys, yet it affords claimants adequate legal representation if they so choose.

I. Cost and Funding

Of the three victim compensation programs examined in this Article, only the Indiana program has a special source of funds in addition to an appropriation from the state general fund. The 1980 Indiana General Assembly provided a $50,000 annual appropriation from the state general fund to the Indiana Industrial Board to administer the state victim compensation program.[190] Prior to this legislation, the Indiana victim compensation program relied solely on a special funding source entitled the "Violent Crime Victims Compensation Fund" which provided that a criminal court cost of ten dollars for all Class A misdemeanors and all felonies would be deposited in a special fund.[191] Pursuant to the 1980 legislation, the Indiana program is currently funded from the state general fund for administrative purposes and the special funding provision for the payment of awards.[192]

Special funding is not without its critics. Carrow noted that "[o]ne disadvantage of this method is that its success is highly dependent on the efforts of other agencies--usually the courts--to collect the additional funds. Some programs have experienced difficulty

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[187]IND. CODE § 16-7-3.6-14 (Supp. 1980). An attorney who knowingly contracts for or receives a fee larger than the amount approved by the Industrial Board commits a Class A misdemeanor and must forfeit his fee for representing a claimant. *Id.*

[188]N.Y. EXEC. LAW § 623(3) (McKinney Supp. 1972-1980). *See also* Edelhertz (pt. 2), *supra* note 6, at 108.

[189]MINN. STAT. ANN. § 299B.071 (Supp. 1980).

[190]Act of Feb. 28, 1980, Pub. L. No. 117, § 7, 1980 Ind. Acts 1309, 1313 (1980) (codified at IND. CODE § 16-7-3.6-20 (Supp. 1980)).

[191]Act of Feb. 27, 1978, Pub. L. No. 358, § 17, 1977 Ind Acts 22, 29 (1978) (current version at IND. CODE § 16-7-3.6-17 (Supp. 1980)).

[192]IND. CODE § 16-7-3.6-17 (Supp. 1980).

in gaining the requisite cooperation."[193] The Indiana experience to date reflects the accuracy of this observation. Concern has been expressed by Indiana administrators about the adequacy of a special funding source which is dependent upon an already overworked court system.[194] Furthermore, the sufficiency of the special fund to fully meet the needs of victim compensation is uncertain. When the Indiana victim compensation program relied solely on the special funding source, $67,903.33 was collected in a six month period to be paid to the "Violent Crime Victims Compensation Fund" in January, 1979.[195] Only four awards at a cost of $11,563.16 were made out of eighty-two claims filed with the victim compensation program from January 1, 1979 to June 15, 1979.[196] Those four awards exhausted a considerable portion of the special fund; consequently, seventy-two of the eighty-two claims were still pending for this period with approximately one-sixth of the fund already distributed.[197] It is strongly advised that if the Indiana program is to rely on the special fund, then the fund must be continuously monitored to confirm its adequacy to fund awards in full. If it is found to be inadequate, the special fund should give way to greater reliance on the state general fund.

The principal costs of a victim compensation program are administrative and compensative. Administrative expenses are generally for salaries, facilities, materials and supplies, and other related requirements. Administrative expenses are typically about 30% of a program's total budget.[198] In fiscal year 1977-1978, administrative expenses for the New York program were 15% of the total budget.[199] In the same fiscal year, administrative expenses were 13% of the total budget in the Minnesota program.[200] In both

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[193]CARROW, *supra* note 22, at 170.

[194]Interview, *supra* note 38.

[195]ANNUAL REPORT, *supra* note 35, at 4. For unknown reasons, sixteen counties, including Marion, did not make deposits into the fund. *Id.*

[196]*Id.* at 7.

[197]*Id.* at 5.

[198]CARROW, *supra* note 22, at 26.

[199]*Id.* at 152. For fiscal year 1977-1978, the New York budget for its victim compensation program was,

Total Budget	$5,052,395
Benefit Payments	4,313,078
Administrative Expenses	739,317
Staff Number	46
Claims Filed	5,489
Number of Awards	1,476

Id.

[200]*Id.* For fiscal year 1977-1978, the Minnesota budget for its victim compensation program was,

of these states, administrative efficiency, roughly measured as the ratio of total budget allocation to administrative costs, is quite high compared to the national norm. After the Indiana program expends its initial start-up cost, the program should attempt to attain the administrative efficiency of the New York and Minnesota programs.

J. Special Statutory Provisions

Several special provisions in the New York and Minnesota victim compensation legislation are worthy of emulation by Indiana. Of particular importance is a provision requiring the New York and Minnesota programs to publicize the availability of compensation for victims of violent crimes.[201] The New York statute stipulates that every police station must have information available, including application forms, relating to the availability of compensation for victims of crime. Every victim who reports a crime must be supplied by the person receiving the report with information and application forms concerning victim compensation. Every general hospital established under state law which provides out-patient emergency medical care must prominently display in its emergency room posters notifying the public of the existence of the crime victim compensation program.[202] The Minnesota legislation specifies that "all law enforcement agencies investigating crimes shall provide forms to each person who may be eligible to file a claim" under the victim compensation program and inform them of their rights thereunder.[203] All law enforcement agencies must maintain a supply of forms nec-

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Total Budget		$400,000
Benefit Payments		347,500
Administrative Expenses		52,500
Staff Number	2	
Claims Filed	389	
Number of Awards	241	

Id.

[201]MINN. STAT. ANN. § 299B.15 (West Supp. 1980); N.Y. EXEC. LAW § 625-a (McKinney Supp. 1972-1980).

[202]N.Y. EXEC. LAW § 625-a (McKinney Supp. 1972-1980). The statute also provides that:

> No cause of action. . . arising out of a failure to give or receive the notice[s] required by [law]. . . shall accrue against the state or any of its agencies or local subdivisions, or, any police officer or other agent, servant or employee thereof, or any hospital or agents or employee thereof, nor shall any such failure be deemed or construed to affect or alter any time limitation or other requirement contained in this article for the filing or payment of a claim hereunder.

Id. § 625-a(2).

[203]MINN. STAT. ANN. § 299B.15 (West Supp. 1980).

essary for the preparation and presentation of claims.[204] These provisions promote more expansive, less sporadic assistance to victims. It is highly recommended that Indiana policymakers mandate a duty to publicize and to inform the public regarding the availability of victim compensation.

The New York and Minnesota statutes have what has come to be known as a "Son-of-Sam" provision. These require that moneys earned by a criminal offender from materials distributed for profit concerning the offender's participation in a particular violent crime must be turned over to the state victim compensation program to distribute as benefits for the victim of the particular violent crimes committed by the offender.[205] The New York Act reads:

> (1) Every person, firm corporation, partnership, association, or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise by terms of such contract, be owing to the person so accused or convicted or his representatives. The Board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.[206]

The statute continues by specifying that the New York Board must publicize by a legal notice in newspapers that such escrow funds are available;[207] that a person found not guilty as a result of the defense of mental disease or defect is deemed a convicted person;[208] and that

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[204] *Id.*

[205] *Id.* § 299B.17; N.Y. EXEC. LAW § 632-a (McKinney Supp. 1972-1980).

[206] N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1972-1980).

[207] *Id.* § 632-a(2).

[208] *Id.* § 632-a(5).

the moneys in the escrow account must be turned over to the accused person upon the dismissal of charges or acquittal, or after five years have elapsed from the establishment of the escrow account if no actions are pending against the convicted person under this provision.[209] Its underlying wisdom is unassailable and entirely compatible with the philosophy of victim compensation. Indiana should adopt similar legislation in order to transfer an otherwise unavailable asset of the criminal to the victim.

V. CONCLUSION

The propriety of state-operated victim compensation programs is beyond debate. Any quarrel should be reserved for questions of means of implementation. This Article has surveyed the Indiana Act in comparison with its New York and Minnesota counterparts. Our conclusion is that Indiana has been somewhat tentative in its embrace of the philosophy of victim compensation. This philosophy is more deeply rooted in New York and Minnesota. Both states offer valuable experience and enlightened legislative models from which Indiana can profit. In a time of heightened anxiety about crime and its corrosive effects, Indiana should improve upon its worthy initial efforts. It should adopt those legislative measures of New York and Minnesota to which we have alluded. They are necessary responses to genuine needs and actual circumstances of victims.

As to fiscal impact, it should be noted that not everything advocated above costs money. Changing the filing, reporting, and emergency award provisions would cost nothing. Publicizing the availability of victim compensation involves relatively insignificant expenditures. There will be some additional costs in providing genuine assistance to victims of violent crimes, but these costs must be borne if victims are to receive their due.

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[209] *Id.* § 632-a(3)-(4).

Notes

Nonstatutory Witness Immunity: Evidentiary Consequences of a Defendant's Breach

I. Introduction

In developing the government's case, a prosecutor frequently uses a grant of immunity to obtain the testimony of a witness against his accomplices. When statutory[1] immunity is conferred on a witness and the witness fails to give the required testimony, the evidentiary consequences of the witness' bad faith are well established. Any statements or information the witness has already given cannot be used against him in any respect if he is later prosecuted.[2] When a witness enters into a nonstatutory[3] immunity agreement, however, and subsequently breaches that agreement, several difficult issues arise concerning the use of any previously given statements in his later prosecution. Until recently, courts have applied a variety of rules ranging from per se admissibility[4] to per se inadmissibility.[5] The disparity, however, has given way in recent years to a more fact-sensitive approach. Courts now consider all the surrounding circumstances of the agreement in order to determine the voluntariness of the witness' statements.[6] This Note will discuss the application of the modern fact-sensitive approach to determine the admissibility of a breaching witness' statements under a nonstatutory immunity agreement. It will also offer some alternatives for avoiding the evidentiary complications which arise when a witness breaches such an agreement.

II. Enforcement of the Agreement

When a prosecutor promises[7] immunity from prosecution to a witness in exchange for cooperation with the government, but does

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[1] *E.g.*, Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-6005 (1976); Cal. Penal Code § 1324 (West Supp. 1980); Ind. Code § 35-6-3-1 (1976). For a general discussion of statutory immunity, see C. McCormick, Handbook of the Law of Evidence § 143 (2d ed. 1972).

[2] *See* text accompanying notes 56-60 *infra*.

[3] *See* text accompanying notes 9-10 *infra*.

[4] *See* text accompanying note 68 *infra*.

[5] *See* text accompanying notes 71-72 *infra*.

[6] *See* text accompanying notes 107-25 *infra*.

[7] Whether the prosecutor actually "promised" immunity is a factual issue. *See* United States v. Weiss, 599 F.2d 730 (5th Cir. 1979); United States v. Rothman, 567 F.2d 744 (7th Cir. 1977). The discussion in this Note assumes the existence of a recognizable promise.

so without express statutory authority, the binding effect of such an agreement is in doubt. Traditionally, prosecutorial promises of immunity were not enforceable unless made pursuant to express statutory authorization.[8] Nevertheless, prosecutors frequently use immunity agreements, absent statutory authorization, to secure a witness' cooperation.[9] Under such an agreement, a witness promises to cooperate with the government in exchange for the prosecutor's promise not to prosecute certain potential criminal charges, to dismiss certain charges, or not to use the statements or information against the witness.[10] Several courts have held that even when a witness has fully performed his part of the bargain, such agreements are not binding on the prosecutor, thus leaving the witness with merely an equitable claim of immunity which does not bar subsequent prosecution.[11] Most of the courts that have adopted this approach, however, have not allowed prosecutors to benefit from lack of express authority; rather, these courts have granted defendants equitable relief when the defendant has fully performed his part of the agreement in good faith.[12] Equitable relief has been based on the public faith pledged by the prosecutor,[13] on the integrity of the judicial

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[8]United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969); United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969). When the witness testifies fully and in good faith under statutory immunity, he is absolutely entitled to the grant of immunity. United States v. Ford, 99 U.S. 594 (1878) (also known as the *Whiskey Cases*).

[9]*See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967); WORKING PAPER OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1419-20 (1970). Several courts have specifically stated that even in the absence of, or lack of compliance with, statutory authority the government has the right to agree not to prosecute an accomplice who is cooperating in the conviction of others. *See, e.g.*, United States v. Librach, 536 F.2d 1228 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976); United States v. Levy, 153 F.2d 995 (3d Cir. 1946).

[10]*See* Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & C. 155, 165 (1976).

[11]United States v. Ford, 99 U.S. 594 (1878); United States v. Levy, 153 F.2d 995 (3d Cir. 1946); State v. Hargis, 328 So. 2d 479 (Fla. Dist. Ct. App. 1976); Lowe v. State, 111 Md. 1, 73 A. 637 (1909); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); State v. Crow, 367 S.W.2d 601 (Mo. 1963); State v. Trocodaro, 36 Ohio App. 2d 1, 301 N.E.2d 898 (1973), *cert. denied*, 415 U.S. 993 (1974).

[12]*E.g.*, Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); Lowe v. State, 111 Md. 1, 73 A. 637 (1909); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); State v. Trocodaro, 36 Ohio App. 2d 1, 301 N.E.2d 898 (1973), *cert. denied*, 415 U.S. 993 (1974).

[13]United States v. Goodrich, 493 F.2d 390 (9th Cir. 1974); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); Camron v. State, 32 Tex. Crim. 180, 22 S.W. 682 (1893).

system,[14] and on the furtherance of justice.[15] Other courts have used the contractual doctrine of detrimental reliance to enforce the agreement when the witness has performed his part of the bargain in reliance upon the prosecutor's promises.[16]

Finally, nonstatutory immunity agreements should be enforceable as analogous to plea bargains, which have been recognized by the Supreme Court as judicially enforceable.[17] Courts and commentators have consistently treated these arrangements as similar for purposes of enforcement.[18] In plea bargains, the most common forms of consideration given by the prosecutor are: (1) a promise to recommend a lesser sentence; (2) a promise to dismiss additional or potential charges; (3) acceptance of a plea of guilty to a lesser offense; and (4) a promise to press the case no further than prosecution of the offense (a promise not to make any particular recommendation for sentence).[19] The defendant's consideration is usually a commitment to: (1) submit a plea of guilty or nolo contendre; (2) waive a constitutional or procedural safeguard; or (3) provide aid or information to the government.[20] The scenario of a prosecutor recommending the dismissal of additional or potential charges in exchange for aid or information on the part of the defendant is almost identical to that which occurs in a nonstatutory immunity agreement.[21]

Additionally, one commentator has noted that nonstatutory immunity agreements may be categorized into three groups: (1) those that are principally plea bargains, in which the defendant's promise to give information is, because of the plea agreement, no additional consideration; (2) those that are both a plea bargain and immunity agreement, in which the defendant's promise to give incriminating information is additional consideration; and (3) those that are strictly

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[14]United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969); State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974).

[15]*In re* Doe, 410 F. Supp. 1163 (E.D. Mich. 1976); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); State v. Reed, 127 Vt. 532, 253 A.2d 227 (1969).

[16]United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); United States v. Rand, 308 F. Supp. 1231 (N.D. Ohio 1970); People v. Brunner, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973); People v. Caruso, 100 Misc. 2d 601, 419 N.Y.S.2d 854 (1979).

[17]Santobello v. New York, 404 U.S. 257, 260 (1971).

[18]*See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Hunter v. Swenson, 372 F. Supp. 287 (W.D. Mo.), *aff'd per curiam*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

[19]Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 772 (1973).

[20]*Id.*

[21]*See* text accompanying note 10 *supra*.

agreements to provide information or incriminating statements.[22] Several courts that have been faced with the hybrid form of agreement in the second category have enforced the immunity agreement as analogous to a plea bargaining agreement.[23] Thus, a nonstatutory immunity agreement is, arguably, enforceable as akin to a plea bargain.[24]

III. The Witness' Required Performance

Although courts generally uphold nonstatutory immunity agreements, it is unclear how the courts will construe such agreements when a witness has not completely fulfilled his part of the agreement. One commentator has noted that by applying the doctrine of consideration, a witness' nonperformance is a failure of consideration.[25] The prosecutor, who is the aggrieved party, may repudiate the agreement and seek to be placed in his original position.[26] Similarly, several courts have held that when a defendant gives none of the bargained-for information or incriminating statements,[27] the prosecutor is not bound by his promise of immunity and may prosecute the defendant for the original crime.[28] When a defendant only partly peforms, a court should utilize the contractual doctrine of substantial performance to determine whether the witness has breached the agreement. This approach was recently

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[22]*See* Thornburgh, *supra* note 10, at 165. The first type of agreement arises when the plea bargain is consummated and the defendant subsequently gives information that is not part of the consideration required by the plea bargain. The third type of agreement is the primary focus of this Note.

[23]*See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Hunter v. Swenson, 372 F. Supp. 287 (W.D. Mo.), *aff'd per curiam*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

[24]Note that the evidentiary consequences of a defendant's breach of nonstatutory immunity agreement may be different from the evidentiary consequences of a defendant's breach of a pure plea bargain. Generally, when the defendant breaches a pure plea bargaining agreement any statements he has already given are not admissible at his later trial. *See* Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410. *See also* United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978). When a defendant breaches a nonstatutory immunity agreement, however, the admissibility of any previously given statements depends upon whether they were made "voluntarily." *See* text accompanying notes 62-64 *infra*.

[25]*See* Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. Crim. L. & C. 334, 342-43 (1974).

[26]*Id.*

[27]The situation in which a prosecutor bargains for information or statements implicating the defendant's accomplices should be distinguished from the situation in which a prosecutor bargains for a confession by the defendant. *See* text accompanying notes 98-105 *infra*.

[28]United States v. Ford, 99 U.S. 594 (1878); United States v. Ciotti, 469 F.2d 1204 (3d Cir. 1972), *vacated on other grounds*, 414 U.S. 1151 (1974).

adopted by the California Court of Appeals in *People v. Brunner*.[29] In *Brunner*, the court determined that when the defendant gave promised testimony before a grand jury but later recanted her testimony and claimed her fifth amendment privilege against self-incrimination,[30] the prosecutor received "substantially what [he] bargained for."[31] In determining whether the defendant had substantially performed, the court measured the witness' performance by the results the prosecutor reasonably expected from the witness' testimony.[32] The court concluded that because the prosecutor received his hoped-for results by the conviction of the witness' accomplices, enough of the bargain had been kept to conclude that the witness had not breached the agreement.[33] Thus, the determination of whether a witness has substantially performed his part of the bargain appears to depend upon whether a prosecutor has made use of the partial testimony or information given by the witness and upon whether such evidence was effective in producing an outcome reasonably expected by the prosecutor. When these two requirements are met, a court should enforce the immunity agreement even though the witness has given only part of the bargained-for information.

IV. Evidentiary Use of the Witness' Statements

If a court finds, based upon the *Brunner* test,[34] that a defendant has not substantially performed his part of the immunity agreement and the prosecutor consequently brings the original charges against him, several issues arise concerning the evidentiary use of any statements elicited from the witness prior to the breach. At this point, the distinction between statutory and nonstatutory immunity becomes crucial.

A. Statutory Versus Nonstatutory Immunity

The evidentiary protection afforded a witness under a statutory immunity grant is different from that which is afforded a witness under a nonstatutory immunity agreement. For purposes of discussing the evidentiary protection afforded a witness, there are basically two types of immunity: "transactional" and "use and derivative use."[35] "Transactional" immunity is absolute immunity from prosecu-

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[29]32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

[30]*See* Note, *supra* note 25, at 339. *See also* note 39 *infra*.

[31]32 Cal. App. 3d at 916, 108 Cal. Rptr. at 507.

[32]*Id.*

[33]*Id.*

[34]*See* text accompanying notes 29-33 *supra*.

[35]*See* Kastigar v. United States, 406 U.S. 441, 449-53 (1972). *See also* Note, *Im-*

tion for any crime about which a witness testifies.[36] "Use and derivative use" immunity does not bar prosecution of a witness; it does, however, prevent the use of the witness' incriminating statements and any evidence derived directly or indirectly from the statements, in any manner in the witness' prosecution.[37]

The type of evidentiary limitations protecting a witness depends upon whether the witness was *compelled* to give incriminating statements under the immunity grant.[38] The presence or absence of compulsion is a critical factor because the fifth amendment[39] does not prohibit the admission of all promise-induced incriminating statements; that amendment excludes only statements that are *compelled* by promises of immunity.[40] Generally, testimony given under a statutory grant of immunity is compelled;[41] statements given under a nonstatutory immunity agreement are not compelled.[42]

1. Fifth Amendment "Compulsion."—A witness is "compelled" to testify when he is granted statutory immunity because once the witness has been granted immunity, he has no option to reject the offer; he must accept the immunity and testify or face a possible conviction for contempt.[43] In the words of the Supreme Court: "Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt."[44]

A witness who enters into a nonstatutory immunity agreement, however, is not "compelled" to give incriminating statements or information. First, the initial choice of whether to enter into a nonstatutory agreement is freely made.[45] This is especially true

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munity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards, 25 VAND. L. REV. 1207 (1972).

[36]*See* United States v. Quatermain, 613 F.2d 38, 40 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980) (quoting Kastigar v. United States, 406 U.S. 441, 453 (1972)).

[37]613 F.2d at 40 (citing 406 U.S. at 452-53).

[38]*See* text accompanying notes 53-61 *infra*.

[39]U.S. CONST. amend. V states in relevant part: "No person . . . shall be compelled in any criminal case to be witness against himself . . . ." This privilege has been extended to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

[40]New Jersey v. Portash, 440 U.S. 450, 459 (1979); Kastigar v. United States, 406 U.S. 441, 461 (1972).

[41]*See* text accompanying notes 43-44 *infra*.

[42]*See* text accompanying notes 45-52 *infra*.

[43]New Jersey v. Portash, 440 U.S. at 459.

[44]*Id.*

[45]*See* Note, *Judicial Enforcement Of Nonstatutory "Immunity Grants": Abrogation By Analogy*, 25 HASTINGS L.J. 435, 461 n.154 (1974). *See also* United States v. Pellon, 475 F. Supp. 467 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980).

when a witness has approached the government with the intial proposal for the agreement.[46] When a witness has solicited promises from the prosecutor, the witness is not the victim of the compelling influences that the fifth amendment was designed to prohibit.[47] Even when a defendant is not the initiator of the agreement, however, the consummation of the agreement is still the result of free choice: the defendant is free to choose whether to accept or reject the prosecutor's offer. His rejection of the offer will result only in his being prosecuted for the original crime.[48] Consequently, a rejection would put the defendant in no worse position than if he had never been offered immunity. This is not true when statutory immunity is conferred on a witness claiming his privilege against self-incrimination. Once statutory immunity is offered to a witness and his fifth amendment privilege is thereby supplanted, he has no option to decline the offer; he must accept the immunity or face a potential contempt charge.[49]

The second reason that a witness is not "compelled" to give incriminating statements under a nonstatutory immunity agreement is that once he has accepted the offer and agreed to give statements, he still has a free choice of whether to make any statements. A refusal to give any statements will leave him in no worse position than if he had not originally entered into the agreement. If the witness has given no incriminating statements, the prosecution has gained nothing by the defendant's breach. The breach has merely put the parties in their original positions. The prosecutor may then simply bring the original charges against the defendant.[50] When a

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[46]United States v. Pellon, 475 F. Supp. 467 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980); State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976), *vacated on other grounds*, 438 U.S. 911 (1978); Taylor v. Commonwealth, 461 S.W.2d 920 (Ky. 1970), *cert. denied*, 404 U.S. 837 (1971).

[47]Taylor v. Commonwealth, 461 S.W.2d 920 (Ky. 1970), *cert. denied*, 404 U.S. 837 (1971). *See* Lederer, *The Law Of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 82 (1976).

[48]*See* text accompanying note 28 *supra*. The possibility of being prosecuted for the original charge is not compulsion to enter into the immunity agreement. In an analogous situation, the Supreme Court held "that an otherwise voluntary guilty plea is not rendered involuntary merely because it was entered to avoid a possible death penalty since the decision to plead guilty was an exercise of the defendant's free choice." Note, *supra* note 19, at 777 n.37 (discussing Brady v. United States, 397 U.S. 742 (1970)). *But see* Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC'Y REV. 527 (1979).

[49]New Jersey v. Portash, 440 U.S. at 459.

[50]*See* text accompanying note 28 *supra*. The prosecution of the original charges after the witness breaches the agreement does not create a double jeopardy issue because jeopardy did not previously attach. "The [Supreme] Court has consistently adhered to the view that jeopardy does not attach, and the [double jeopardy clause of the fifth amendment has] no application, until a defendant is 'put to trial before the

witness has been conferred statutory immunity, however, he must testify fully and truthfully.[51] Although, theoretically, the witness still has a "choice" of whether to testify, a failure to testify may result in a charge of contempt.[52] That potential criminal charge subjects a witness to compulsion not present in nonstatutory immunity agreements.

2. Evidentiary Significance of Compulsion.—The Supreme Court stated, in *Kastigar v. United States*,[53] that when a defendant is compelled by a grant of statutory immunity to testify in place of his fifth amendment privilege against self-incrimination, he must be left in "substantially the same position as if [he] had claimed the Fifth Amendment privilege."[54] After determining that transactional immunity was broader than required by the fifth amendment, the Court held that immunity from use and derivative use of a defendant's statements was coextensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of the privilege.[55]

Relying on its decision in *Kastigar*, the Court has recently held that because statutory immunity requires use and derivative use protection, when a witness does not give all the required testimony under a statutory immunity grant, any statements he has given may be used against him only in a prosecution for perjury.[56] If the government wishes to prosecute the defendant for any criminal activity disclosed by his statements, the prosecutor may not use any evidence gained from the defendant either directly or derivatively[57] to convict him.[58] The prosecutor bears the burden to prove that the evidence it proposes to use against the defendant was "derived from a legitimate source wholly independent of the compelled

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trier of facts . . . .'" Serfass v. United States, 420 U.S. 377, 388 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)). "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Id.* (citation omitted). "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." *Id.* (citation omitted). Thus, when the prosecutor brings the previously dismissed charges against the defendant, the fifth amendment's guarantee against double jeopardy is not violated.

[51]Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

[52]*See* notes 43-44 *supra* and accompanying text.

[53]406 U.S. 441 (1972).

[54]*Id.* at 462.

[55]*Id.*

[56]United States v. Apfelbaum, 445 U.S. 115 (1980).

[57]"Direct" use of evidence means the admission of that evidence at the defendant's trial. "Derivative" use of evidence means the use of that evidence to search out other evidence which is admitted at the defendant's trial. *See* 406 U.S. at 460.

[58]*Id.* at 456-57; Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

testimony."[59] Additionally, no evidence gained from the defendant under the statutory immunity grant can be used to impeach the defendant's testimony at his trial.[60]

The basis for all of these evidentiary limitations, however, lies in the principle that the compulsion inherent in statutory immunity grants requires use and derivative use protections.[61] Because compulsion is absent in nonstatutory immunity agreements the evidentiary protections afforded a witness under statutory immunity are not necessary for nonstatutory immunity.

B. Application of the Voluntariness Standard

Because the evidentiary protections afforded a witness under a statutory immunity grant are not applicable to nonstatutory immunity agreements, some other test must be used to determine whether any statements a breaching defendant has made may be used against him at his later trial. In general, it has long been held that a confession, admission, or other incriminating statement[62] by an accused must be voluntary[63] to be admissible at trial.[64] In *Bram v. United States*,[65] the United States Supreme Court held that for a statement to be admissible at trial it must be freely and voluntarily

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[59]406 U.S. at 460.

[60]New Jersey v. Portash, 440 U.S. 450 (1979). *See generally* Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421 (1980). *Compare Portash with* Harris v. New York, 401 U.S. 222 (1971), in which the Supreme Court held that incriminating statements that are inadmissible because they were obtained in violation of procedural safeguards required by Miranda v. Arizona, 384 U.S. 436 (1966), *are* admissible for impeachment purposes to attack the credibility of the defendant's testimony at trial. 401 U.S. at 226.

[61]*See* text accompanying notes 53-55 *supra*.

[62]The Supreme Court has not distinguished between confessions, admissions, or other incriminating statements but, instead, has extended the privilege against self-incrimination to protect an individual from being compelled to incriminate himself in any manner. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966).

[63]*See, e.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961). The Supreme Court has stated that a confession is involuntary if it is not "the product of an essentially free and unconstrained choice" or if the confessor's "will has been overborne and his capacity for self-determination critically impaired." *Id.* at 602. *See generally* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 478 (1978). The standard for voluntariness used in this Note is whether the witness' capacity for self-determination has been impaired.

[64]Once the defendant's statements are deemed "voluntary," they are not only admissible in the prosecutor's case in chief, but may also be used for impeachment purposes to attack the defendant's trial testimony and may be used derivatively to gain other evidence to be admitted at trial. Michigan v. Tucker, 417 U.S. 433, 450 (1974) (derivative use); Harris v. New York, 401 U.S. 222, 224-26 (1971) (impeachment use).

[65]168 U.S. 532 (1897).

given and cannot be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[66] This rule has been reiterated by the Supreme Court in several later decisions.[67] Few jurisdictions, however, have applied the voluntariness test to determine whether a breaching witness' statements are admissible when given under a nonstatutory immunity agreement.

At common law, when a defendant promised to testify against his accomplices in exchange for immunity from prosecution, and thereafter refused to testify, or testified falsely, he could be convicted upon his own incriminating statements.[68] This rule did not depend on whether the defendant's incriminating statements were voluntary; the statements were per se admissible if he did not perform his part of the bargain.

The decisions of jurisdictions that have applied the voluntariness standard to statements made by a breaching defendant under nonstatutory immunity are in direct conflict with one another. For example, in *State v. Moran*,[69] the Oregon Supreme Court followed the common law rule, stating:

> [W]e have not been unmindful of the great care and caution courts must always exercise in the admission of confessions of persons accused of crime, nor of the fact that they must have been freely and voluntarily made; but these considerations do not appear to be sufficient to exclude accusatory facts freely and voluntarily disclosed by an accomplice under an agreement made by the state, represented by its district attorney, that he will testify fully and truly against his associate in the crime, and who thereafter repudiates his agreement, and refuses to testify.[70]

In *Lauderdale v. State*,[71] however, the Texas Court of Criminal Appeals rejected this reasoning in favor of a rule that would make such statements per se inadmissible. After restating the requirement that all confessions must be freely and voluntarily made without compulsion or persuasion, the court held:

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[66]*Id.* at 542-43. For a detailed discussion of the voluntariness doctrine as applied to confessions, see Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

[67]*E.g.*, Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam); Brady v. United States, 397 U.S. 742, 753 (1970).

[68]Commonwealth v. Knapp, 27 Mass. 486, 10 Pick. 477 (1830).

[69]15 Or. 262, 14 P. 419 (1887).

[70]*Id.* at 273, 14 P. at 425.

[71]31 Tex. Crim. 46, 19 S.W. 679 (1892).

> If the party has been . . . persuaded into making [incriminating statements], in hope that he would be permitted to turn state's evidence, and thereby gain immunity from punishment, in *no event* could such confession be used against him, if he subsequently repudiated the agreement, and refused to testify as a witness for the state.[72]

The courts in both cases, however, were concerned only with the issue of whether a defendant's breach alone would render his statements admissible or inadmissible. The modern voluntariness doctrine, on the other hand, is concerned with whether the governmental inducement always inherent in promises of leniency[73] will render involuntary the incriminating statements of an accused. The doctrine of voluntariness was developed to assure that the inherently coercive atmosphere of police interrogation[74] did not overbear a defendant's will to resist and thereby "bring about a confession not freely self-determined."[75] Although the voluntariness test has traditionally been applied to confessions in the context of police interrogation,[76] the Supreme Court, in *Shotwell Manufacturing Co. v. United States*,[77] extended this doctrine to a case involving a government promise of immunity in exchange for incriminating information. In *Shotwell*, the defendant took advantage of the immunity offered under the Treasury Department's "voluntary disclosure policy,"[78] which allowed delinquent taxpayers to "escape possible criminal prosecution by disclosing their derelictions to the taxing authorities before any investigation of them had commenced."[79]

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[72]*Id.* at 50-51, 19 S.W. at 681 (quoting Lopez v. State, 12 Tex. Crim. 27, 29-30 (1882)) (emphasis added).

[73]*See* text accompanying note 92 *infra*.

[74]*See* Miranda v. Arizona, 384 U.S. 436, 445-55 (1966); Culombe v. Connecticut, 367 U.S. 568, 575 (1961).

[75]Rogers v. Richmond, 365 U.S. 534, 544 (1961). The Supreme Court has consistently been concerned with preserving an individual's freedom of will in making confessions. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) ("product of his free and rational choice"); Haynes v. Washington, 373 U.S. 503, 514 (1963) ("product of a free and unconstrained will"); Blackburn v. Alabama, 361 U.S. 199, 206-17 (1960) ("freedom of will").

[76]*See* United States v. Bernett, 495 F.2d 943, 956-57 (D.C. Cir. 1974).

[77]371 U.S. 341 (1963).

[78]The voluntary disclosure policy declared that if the delinquent taxpayer confessed, before an investigation had begun, to willfully or negligently filing an insufficient return and then assisted the Treasury Department in computing the true tax liability, the Department would collect the tax and the penalty and forego criminal prosecution. This policy was never formalized by statute or regulation and was abandoned by the Treasury Department in 1952. *See* Recent Decisions, *Shotwell Mfg. Co. v. United States*, 27 ALB. L. REV. 300, 300-01 (1963); Note, *Governmental Promises of Immunity*, 11 U.C.L.A. L. REV. 302, 304 (1964).

[79]371 U.S. at 344.

After the defendant had made fraudulent disclosures under the policy, the government attempted to admit those disclosures at his trial. The defendant moved to suppress the evidence on the grounds that its use would violate the self-incrimination clause of the fifth amendment.[80] The Court ultimately held that use of the evidence did not violate the defendant's privilege against self-incrimination for two reasons: (1) the governmental promise of immunity did not produce an involuntary confession; and (2) once there had been a deliberately fraudulent disclosure, the defendant must have recognized that the offer of immunity had in effect been withdrawn and therefore the defendant was no longer entitled to rely on it.[81] On the basis of the *Bram* voluntariness test,[82] the Court found that the confession was voluntary because the offer of immunity was not addressed to any particular known or suspected delinquent taxpayers but to the public in general.[83] In dicta, the Court discussed the situation in which an offer of immunity is directed to a particular suspect, stating:

> Petitioners' position is not like that of a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement. In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will.[84]

Similarly, in a footnote, the Court stated: "A quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution. A disclosure made in such circumstances . . . would have been inadmissible in evidence under the *Bram* test."[85]

One commentator has concluded, on the basis of this language, that when a witness breaches a nonstatutory immunity agreement his incriminating statements can never be used against him in a subsequent prosecution for the crime to which he testified.[86] That commentator assumed that the overall result of agreement and breach of the agreement was equivalent to initially granting a defendant use immunity.[87] By this interpretation, after a breach of the im-

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[80]*Id.* at 346.

[81]*Id.* at 349-50.

[82]*See* notes 65-66 *supra* and accompanying text.

[83]371 U.S. at 348.

[84]*Id.*

[85]*Id.* at 350 n.10.

[86]*See* Note, *supra* note 25, at 343. *See also* United States v. Weiss, 599 F.2d 730, 737 (5th Cir. 1979).

[87]*See* Note, *supra* note 25, at 343 n.71.

munity agreement a prosecutor would be unable to use any incriminating statements given by the witness either directly or derivatively at his later trial.[88] This interpretation effectively equates the evidentiary consequences of a defendant's breach of statutory and nonstatutory immunity grants.[89] Such a result, however, fails to take into account the essential difference between statutory and nonstatutory immunity; that is, the lack of compulsion in nonstatutory immunity agreements implies that the evidentiary protections afforded a witness under statutory immunity are not applicable to nonstatutory immunity.[90]

The language[91] in *Shotwell* also fails to distinguish between a defendant's confession induced by a prosecutor's promise of leniency and a defendant's failure to give bargained-for information under an immunity agreement. In every instance in which a prosecutor promises leniency in exchange for a defendant's statements, the defendant's execution of his part of the bargain is "induced" by the prosecutor's promises.[92] Because inducement is always present in nonstatutory immunity agreements, the existence of governmental inducement should not be the determinative factor in ascertaining whether a defendant's statements were voluntary. To extend the *Shotwell* language[93] to mean that in *all* cases in which the government has made a promise of immunity or leniency to a witness, his statements are per se involuntary and therefore inadmissible, would create a rule that is overbroad and unwarranted.[94] Such a rule would create a "but for" test for voluntariness; that is, statements would be involuntary if they would not have been made "but for" the promise of immunity. The Supreme Court has stated, however, that causation in the "but for" sense has never been the test for determining the voluntariness of statements.[95] The mere fact that an admission or confession is induced in a "but for" sense by a promise of leniency does not necessarily imply that the promise was a compelling influence.[96]

Finally, the Court in *Shotwell* failed to distinguish between a prosecutor offering leniency in exchange for a confession which will

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[88]*See* text accompanying notes 57-58 *supra*.

[89]*See* text accompanying notes 56-60 *supra*.

[90]*See* text accompanying notes 41-61 *supra*.

[91]*See* text accompanying notes 84-85 *supra*.

[92]United States v. Davis, 617 F.2d 677, 686 (D.C. Cir. 1979).

[93]*See* text accompanying notes 84-85 *supra*.

[94]*See* United States v. Davis, 617 F.2d 677, 686 (D.C. Cir. 1979).

[95]Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam). *See also* Santobello v. New York, 404 U.S. 257, 261-62 (1971).

[96]*See* Hunter v. Swenson, 372 F. Supp. 287, 300 (W.D. Mo.), *aff'd*, 504 F.2d 1104 (8th Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

be used to convict the person making the confession and the situation in which the prosecutor promises immunity from prosecution to a potential defendant in exchange for information to be used not against the testifying witness but against his accomplices. The former type of leniency proposal was the basis for the Supreme Court's holding in *Bram*[97] and its application of that rule in subsequent confession cases.[98] As the Supreme Court later explained in *Brady v. United States*:[99]

> *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.[100]

This type of leniency proposal, termed "confession bargaining" by one commentator,[101] has met with consistent disapproval by the courts.[102]

In the latter type of leniency proposal, however, a prosecutor promises immunity in exchange for information not with the intent to use the statements against the defendant but against his accomplices. A testifying defendant under such an agreement has freely entered into the bargain[103] and has been promised complete immunity from prosecution. It is only when the defendant breaches the agreement that he is subject to the evidentiary use of his statements. In this way, a prosecutor is not "confession bargaining"; he is bargaining for performance of a contractual agreement with an assumption that upon complete performance by the witness the prosecutor will not have to use his statements against the witness.[104]

For these reasons, the *Bram* rule that confessions are per se in-

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[97]*See* text accompanying notes 65-66 *supra*.

[98]*See, e.g.*, Brady v. United States, 397 U.S. 742 (1970); Rogers v. Richmond, 365 U.S. 534 (1961).

[99]397 U.S. 742 (1970).

[100]*Id.* at 754.

[101]*See* Note, *Comparing Confessions and Plea Bargains:* United States v. Robertson *and the Admissibility of a Defendant's Incriminating Statements*, 60 B.U.L. REV. 368 (1980).

[102]*See, e.g.*, People v. Jimenez, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); Plummer v. State, 365 So. 2d 1102 (Fla. Dist. Ct. App. 1979); Fullard v. State, 352 So. 2d 1271 (Fla. Dist. Ct. App. 1977), *overruled in part*, Brown v. State, 376 So. 2d 382 (Fla. 1979); People v. Perez, 72 Ill. App. 3d 790, 391 N.E.2d 456 (1979).

[103]*See* text accompanying notes 45-49 *supra*.

[104]*See* note 27 *supra*.

voluntary if they result from any direct or implied promises[105] should not be applied to nonstatutory immunity agreements.

C. Application of the "Totality of the Circumstances" Test

Rather than rely on a "per se involuntary" rule which depends on the presence or absence of inducement and promises, courts should use the "totality-of-the-circumstances"[106] test for voluntariness to determine the admissibility of a witness' statements when he breaches a nonstatutory immunity agreement.[107] The totality-of-the-circumstances test is a flexible approach because it considers a wide variety of factors surrounding the consummation of the agreement in order to determine voluntariness.[108] This approach was recently used by a federal district court in *United States v. Williams*.[109] In *Williams*, the defendant agreed to give statements concerning his involvement in a bank robbery in exchange for a reduction in bail and an indictment for a lesser offense.[110] The defendant later moved to suppress his statements at trial on the grounds that his incriminating statements were "the product of direct or implied promises however slight"[111] and therefore were involuntary.[112] The district court rejected the per se rule developed in *Bram*;[113] instead, it considered the totality of the circumstances surrounding the agreement to determine whether the defendant's statements were voluntary.[114] The court set forth a list of factors to consider in applying that test, including whether:

> (1) defendant is in custody at the time of the statement . . . ; (2) defendant is alone and unrepresented by counsel . . . ; (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf . . . ; (4) defendant is aware of his constitutional and other legal rights . . . ; (5) the potentially incriminating statement is part of an abortive plea bargain . . . ; (6) promises or inducements leading to the statement are fulfilled by pro-

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[105]*See* text accompanying note 66 *supra*.

[106]*See* Boulden v. Holman, 394 U.S. 478, 480 (1969); Haynes v. Washington, 373 U.S. 503, 513-14 (1963); Rogers v. Richmond, 365 U.S. 534, 543-44 (1961).

[107]*See* United States v. Ferrara, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967).

[108]*See, e.g.*, Haynes v. Washington, 373 U.S. 503, 514 (1963).

[109]447 F. Supp. 631 (D. Del. 1978).

[110]*Id.* at 631-32.

[111]*Id.* at 633 (citing Bram v. United States, 168 U.S. 532, 542-43 (1897)).

[112]447 F. Supp. at 633.

[113]*See* notes 65-66 *supra* and accompanying text.

[114]447 F. Supp. at 637.

> secuting authorities . . . ; and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent . . . .[115]

Applying these considerations to the facts of the case, the court held that the defendant's statements were voluntary because they were knowingly made, the defendant was aware of his constitutional rights, he was not in custody at the time he made the statements, there was no evidence of protracted interrogation, the prosecutor fulfilled all his promises, and those promises conferred a significant benefit upon the defendant.[116]

Similarly, a federal circuit court has recently held, in *United States v. Davis*,[117] that statements resulting from a plea bargain are not involuntary per se, even though "induced" by the prosecutor's return promises.[118] In *Davis*, the defendant entered into a plea agreement whereby he was to furnish testimony and cooperation in an investigation in exchange for a plea of guilty to one count of felony.[119] After giving the promised testimony, the defendant withdrew his plea of guilty and later moved to suppress his statements, contending that they were involuntary under *Bram*.[120] The court rejected the appellant's motion to suppress, stating, "We cannot conclude that pleas and statements resulting from plea bargaining are *always* involuntary. Rather, the proper task is a case-by-case consideration of whether the defendant voluntarily entered into the plea agreement and whether he testified voluntarily, as revealed by an examination of the surrounding circumstances."[121] The court considered the following facts important in determining that the defendant's statements were voluntary: "[The defendant] freely negotiated the plea agreement while represented by counsel. He appeared and testified before the grand jury without compulsion. . . . The Government's promises of leniency . . . were bargained-for terms of the agreement, not overbearing or improper inducements . . . . His testimony was a quid pro quo for the Government's promises."[122]

Because nonstatutory immunity agreements are closely analogous to plea bargains[123] and the agreement in *Davis* was a

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[115]*Id.* at 636-37 (footnote and citation omitted).

[116]*Id.* at 637-38.

[117]617 F.2d 677 (D.C. Cir. 1979).

[118]*Id.* at 686.

[119]*Id.* at 681.

[120]*Id.* at 686. *See* notes 65-66 *supra* and accompanying text.

[121]617 F.2d at 686-87.

[122]*Id.* at 687 (footnotes and citation omitted).

[123]*See* text accompanying notes 17-24 *supra*.

hybrid form of plea bargain and nonstatutory immunity,[124] the factors set forth in *Davis* can arguably be utilized in conjunction with those enumerated in *Williams* to determine the voluntariness of the defendant's statements.

Of the factors considered in *Williams* and *Davis*, perhaps the singularly most important is whether the defendant was represented by counsel at the time he gave the statements under the immunity agreement. In *Hutto v. Ross*,[125] the Supreme Court recently indicated that the presence of counsel is a critical factor in determining whether a defendant voluntarily confessed under a plea bargaining agreement. In *Hutto*, the defendant entered into a plea agreement with the understanding that he would receive a recommended sentence.[126] The defendant gave statements concerning his actions in the crimes involved and subsequently withdrew his guilty plea.[127] The Supreme Court overturned the appellate court decision which had held that any statement made as a result of a plea bargain was inadmissible.[128] In determining that the defendant's statements were not per se involuntary, the Court stated:

> The existence of the bargain may well have entered into respondent's decision to give a statement, but counsel made it clear to respondent that he could enforce the terms of the plea bargain whether or not he confessed. The confession thus does not appear to have been the result of "'any direct or implied promises'" or any coercion on the part of the prosecution, and was not involuntary.[129]

Similarly, in another plea bargaining case, the Supreme Court stated, "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel . . . ."[130] It appears from these cases that the presence and advice of counsel at the time a witness gives his statements would assure that the other factors set forth in *Williams* and *Davis* are satisfied.

In essence, the factors enumerated in *Williams* and *Davis* represent a "fairness" approach[131] to determining voluntariness. The

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[124]*See* text accompanying notes 22-23 *supra*.

[125]429 U.S. 28 (1976) (per curiam).

[126]*Id.* at 28.

[127]*Id.* at 28-29.

[128]*Id.* at 30.

[129]*Id.* (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).

[130]Brady v. United States, 397 U.S. 742, 754 (1970).

[131]*See generally* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Comment, *Remedies for Reneged Plea Bargains in California*, 16 SANTA CLARA L. REV. 103 (1975).

courts in those two cases did not apply a rigid absolute rule that whenever statements are "induced" by promises of leniency they are involuntary. Such a rule would not be conducive to the widely heterogenous fact situations present in nonstatutory immunity agreements. Instead, the courts in *Williams* and *Davis*, in utilizing the totality-of-the-circumstances test, looked to the overall fairness of the bargain to determine whether the statements were "freely self-determined."[132]

This approach is widely used in plea bargaining situations[133] and could easily be adopted to nonstatutory immunity agreements. The Supreme Court has held that a guilty plea must be knowing, intelligent, and entered into with sufficient awareness of the relevant circumstances and likely consequences.[134] The Court has also stated that if the guilty plea is induced by promises, the "essence of those promises must in some way be made known."[135] Thus, the basic inquiries under the totality-of-the-circumstances approach would be whether the witness had a clear understanding of his alternatives when bargaining with the prosecutor and whether he gave information to the prosecutor on the basis of a knowing and intelligent choice.

V. Suggested Alternatives

In light of the considerations[136] utilized in determining the voluntariness of a witness' statements, perhaps the best solution to resolve the question of voluntariness would be to utilize a formal, written agreement between the prosecutor and the witness. This solution has been commonly advocated to solve the problems of broken promises and misrepresentations in plea bargains.[137] One commentator has indicated that a written contract would provide a concrete, public testament of the agreement that could be incorporated at the trial level into the record.[138] Another commentator has noted that the United States Department of Justice requires, in departmental guidelines, that a nonstatutory immunity agreement be reduced to a written statement and signed by the witness or his

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[132]*See* note 75 *supra* and accompanying text.

[133]*See generally* Note, *supra* note 19.

[134]Brady v. United States, 397 U.S. 742, 748 (1970).

[135]Santobello v. New York, 404 U.S. 257, 261-62 (1971).

[136]*See* text accompanying notes 16-17 and 122 *supra*.

[137]*See* Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 Duq. L. Rev. 591, 596-600 (1979); Note, *supra* note 19, at 795.

[138]*See* Note, *supra* note 19, at 797.

counsel.[139] In this way, the agreement could be enforced by applying the large body of existing contract law.[140]

The written contract could include the essential terms of the immunity agreement, including the consideration given by, and the exact performance required of, each party to the contract. The performance provisions would aid the court in determining whether the parties have "substantially performed"[141] their part of the bargain under the *Brunner* test.[142] The contract could also include a description of the circumstances surrounding the agreement, specifying the factual considerations enumerated in *Williams* and *Davis*.[143] Setting forth the facts surrounding the bargain, although not dispositive, would aid the court in determining whether the defendant's statements were "voluntary," and therefore admissible, under the "totality-of-the-circumstances" test.[144]

Ideally, the contract would contain provisions that state the precise evidentiary consequences of a breach by either party. Such a clause could provide that in the event that the defendant fails to perform his part of the bargain any statements or information he has given prior to the breach will be deemed voluntary and will be used against him at his later trial. By simply enforcing the written terms of the contract, a court would not need to reach the issue of voluntariness to determine the admissibility of the breaching defendant's statements. A court might, however, still scrutinize the contract to assure that the agreement was not unconscionable and that the witness was represented by counsel in the bargaining process.

As a practical matter the inclusion of such a forfeiture clause might prevent the defendant's acceptance of the terms of the written agreement. On the other hand, if such a provision is accepted by the defendant, it would deter the witness from breaching the agreement.

VI. Conclusion

Although the rules set forth in *Bram*[145] and *Shotwell*[146] have not been specifically repudiated, they should be reserved for situations in which a defendant is induced to make a confession in the context of police interrogation or some other type of coercion or compulsion.

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[139]*See* Thornburgh, *supra* note 10, at 166.

[140]*Id.* at 164-66.

[141]*See* note 31 *supra* and accompanying text.

[142]*See* notes 29-33 *supra* and accompanying text.

[143]*See* text accompanying notes 110-24 *supra*.

[144]*See* text accompanying notes 107-08 *supra*.

[145]*See* notes 65-66 *supra* and accompanying text.

[146]*See* notes 77-85 *supra* and accompanying text.

If a witness knowingly and intelligently enters into an enforceable agreement with the prosecutor and later breaches that agreement, the courts should not resort to a rule that makes any statements given by the witness per se involuntary, and therefore per se inadmissible. Instead, the courts should determine the voluntariness of the witness' statements by examining all the circumstances surrounding the agreement. If the *Williams* and *Davis* factors[147] are satisfied, a defendant's statements should be considered voluntary and admissible.

Finally, much of the confusion and difficulty surrounding the determination of the admissibility of a breaching witness' statements could be alleviated by the use of a written contract enumerating all the essential terms of the nonstatutory immunity agreement and specifically setting forth the exact evidentiary consequences of a breach by the witness.

RAYMOND R. STOMMEL, JR.

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[147]*See* text accompanying notes 115-24 *supra*.

Indianapolis Desegregation: Segregative Intent and the Interdistrict Remedy

I. INTRODUCTION

The desegregation of this nation's public schools has, since 1954, posed a series of nearly intractable problems for the federal judiciary. In that year, the "separate but equal" doctrine of *Plessy v. Ferguson*[1] was discarded for the public schools, and a new era in education and law was born in the Supreme Court opinion of *Brown v. Board of Education* (*Brown I*).[2] *Brown I* was the result of a carefully planned and executed campaign by the NAACP against legally segregated school systems.[3] School districts from South Carolina, Virginia, Kansas, and Delaware were initially confronted and combined in this case.[4] The Supreme Court held "that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment"[5] because "[s]eparate educational facilities are inherently unequal."[6]

The Court said that the inequality perceived in segregated schools stems not from the tangible aspects of education[7] but rather from the fact that "[s]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."[8] When the inequality appears on the face of a state statute,[9] the violation is ob-

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[1]163 U.S. 537 (1896).

[2]347 U.S. 483 (1954) (*Brown I*).

[3]AFRO-AMERICAN HISTORY: PRIMARY SOURCES 365 (T. Frazier ed. 1970).

[4]347 U.S. at 483 n.*. It is interesting to note that two of the cases—those from Kansas and Delaware—were in northern states but were combined with the southern cases because the segregation of the public school facilities was mandated by state law in all four. *See id.* at 486-87 n.1.

[5]*Id.* at 495.

[6]*Id.*

[7]*Id.* at 492.

[8]*Id.* at 494.

[9]The following are examples of facially segregative laws: "The Trustee or Trustees of each township, town or city, shall organize the colored children into separate schools, having all the rights and privileges of other schools of the township." Act of May 13, 1869, ch. 16, § 3 1869 Ind. Acts (Spec. Sess.) 41, *as amended by* Act of March 5, 1877, ch. 81, § 1, 1877 Ind. Acts 124 (repealed by Act of March 8, 1949, ch. 186, §§ 1-8, 1949 Ind. Acts 603 (replaced by IND. CODE §§ 20-8.1-2-1 to -7 (1976)). "It shall be unlawful for pupils of one race to attend the schools provided by the boards of

viously offensive and is clearly subject to the strictures of the equal protection clause of the fourteenth amendment. Such laws inevitably create a dual system of education wherein blacks and whites each have their own schools. Therefore, problems of desegregating racially segregated schools arise predominantly when state action is subtle and the intent to create a dual system is less defined. This situation is more likely to be confronted in the North than in the South because southern legislators promulgated more facially segregative laws.[10]

The Indianapolis desegregation case,[11] spanning twelve years of litigation, is, in many respects, a prototype of school desegregation actions in the North. The actions creating the segregative condition were often facially neutral. Yet, the case is unique because the interdistrict remedy suggested by District Judge Dillin in 1971[12] was relatively innovative. Interdistrict remedies had rarely been considered, much less implemented, up to that time.[13] The Indianapolis litigation is also unique for the very reason that there was a nine-year delay between the 1971 remedy and its "acceptance" in 1980 by the Supreme Court.[14] Because each school desegregation case encompasses a different factual situation, it is extremely difficult for the judiciary, inexperienced in the field of education, to formulate a coherent and cohesive body of law. The Indianapolis case can be viewed both as a stage in the evolving case law on desegregation and as one of the many disparate decisions ratified on a case-by-case basis by a Court grappling with the almost insurmountable task created by *Brown I*.

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trustees for persons of another race." S.C. CODE § 59-63-10 (1976). "White and colored children shall not be taught in the same school." VA. CONST. of 1902 § 140 (repealed by VA. CONST. art. VIII, § 1 (1971)).

[10]Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 287 (1965).

[11]The litigation included many published opinions: United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973) [hereinafter cited as *Indianapolis I*]; United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind.) [hereinafter cited as *Indianapolis II*], *supp. mem. of decision*, 368 F. Supp. 1223 (S.D. Ind. 1973) [hereinafter cited as *Indianapolis III*], *aff'd in part, rev'd in part, and remanded*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929, *on remand*, 419 F. Supp. 180 (S.D. Ind. 1975) [hereinafter cited as *Indianapolis IV*], *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded sub nom.* Bowen v. United States, 429 U.S. 1068 (1977), *on remand*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978) [hereinafter cited as *Indianapolis V*], *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 101 S. Ct. 114 (1980). References to the litigation in this Note will be to the specific bracketed appellations.

[12]*Indianapolis I*, 332 F. Supp. at 679.

[13]*See* note 65 *infra* and accompanying text.

[14]United States v. Board of School Comm'rs, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 114 (1980).

The purpose of this Note is to analyze the constitutional violation and the subsequent imposition of an interdistrict remedy in Indianapolis. The Indianapolis case will be compared with other case law with respect to the finding of segregative intent and will be reconciled with major decisions in other public school cases. This reconciliation will point out the infirmities in the Indianapolis opinions which enable them to be harmonized with other decisions. This Note will also indicate why the interdistrict remedy in Indianapolis would today probably be accepted on a lesser standard of segregative intent than the lower courts' opinions indicate.

II. NORTHERN SEGREGATION

The plight of black pupils in the North began with southern racial attitudes and the great migrations of black families from the South in the first decades of the twentieth century.[15] Great numbers of blacks, discouraged by agricultural conditions in the South and enticed by the industrial North, arrived at their new urban homes and found themselves segregated from their white neighbors.[16] Although some northern legislatures had enacted facially segregative laws,[17] most northern segregation was the result of private discrimination, poverty, and a strong cultural identity creating distinct black metropolitan ghettos.[18]

Today, this isolation is perpetuated in school districts where there exists a strong policy to send children to schools near their homes: "[I]t is becoming apparent that perhaps the primary cause of . . . segregation in urban schools is the socio-economic conditions of the Negro. . . . Segregation results from adherence to the neighborhood school assignment policy."[19] City schools become even more racially identifiable as a result of "white flight"—the fleeing of white families from inner cities to outlying areas. This type of school segregation, called de facto segregation, is racial separation caused by forces unconnected to any purposeful state action[20] and as such has traditionally not been considered amenable to remedy. De

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[15]*See* AFRO-AMERICAN HISTORY: PRIMARY SOURCES 249-51 (T. Frazier ed. 1970).

[16]*Id.* "Between the years 1910 and 1920, the black population increased in Detroit by 611.3 per cent, in Cleveland by 307.8 per cent, in Gary (Indiana) by 1,283.6 per cent, in Chicago by 148.2 per cent." *Id.* at 249.

[17]Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L.L. REV. 124, 124 (1974).

[18]*See* Spear, *The Origins of the Urban Ghetto, 1870-1915*, in 2 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 153 (1971).

[19]40 N.Y.U.L. REV., *supra* note 10, at 290.

[20]J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 567-68 (1978). Racially identifiable schools create the impression of a dual system.

jure segregation, on the other hand, is created by intentional state action and is unconstitutional and remediable. The equal protection issues in northern school desegregation cases, therefore, revolve around whether the current duality in schools was caused by the more "benign" de facto segregation or by de jure segregation.

The emphasis upon finding segregative intent in northern cases was born in the Supreme Court decision in *Keyes v. School District No. 1, Denver*,[21] the first major northern school case to reach the Court after *Brown I*. According to the majority in *Keyes*, only those acts that have the sanction of law and are intentionally segregative violate the Constitution.[22] Therefore, the focus of a court's scrutiny in a northern case must be upon the actions which created a segregated school system.

Northern schools sometimes became segregated by laws that either required or permitted segregation by their specific terms, as in the Kansas and Delaware lower court cases which led to *Brown I*.[23] This situation makes the determination of the offense fairly simple. But intentionally segregative state action is much harder to find when facially neutral state action has created a segregated condition or aggravated existing de facto segregation. Such apparently neutral acts as gerrymandered attendance boundaries,[24] optional attendance zones,[25] free transfer systems,[26] and faculty segregation[27] have been imposed by local school boards, not by state statute.[28] State

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[21]413 U.S. 189 (1973).

[22]*Id.* at 198.

[23]Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951); Belton v. Gebhart, 32 Del. Ch. 343, 87 A.2d 862 (1952).

[24]Gerrymandering the attendance boundaries for each school building on racial lines to maintain segregation is a fairly common practice. *See, e.g.*, Adams v. United States, 620 F.2d 1277, 1281 (8th Cir.), *cert. denied*, 101 S. Ct. 88 (1980); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1056 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977).

[25]Optional attendance zones give students in racially mixed residential areas the opportunity to select the school of their choice; the student's decision is usually based upon the predominant racial composition of the facility. *E.g.*, United States v. Board of School Comm'rs, 332 F. Supp. 655, 668 (S.D. Ind. 1971).

[26]Students are able to attend schools outside their attendance zones and even outside their districts when a school board has instituted a system of free transfer. *E.g.*, Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 149 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973) (crossing attendance lines); Evans v. Buchanan, 393 F. Supp. 428, 433 (D. Del. 1975) (crossing district lines).

[27]Once a dual system becomes apparent, it is not uncommon for a school board to assign teachers to buildings in accordance with their own race. *E.g.*, United States v. Board of School Comm'rs, 332 F. Supp. 655, 665 (S.D. Ind. 1971); Davis v. School Dist., 309 F. Supp. 734, 743 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

[28]For the purpose of charging "state action" under the fourteenth amendment, local school boards are considered agents of the state. *See* Cooper v. Aaron, 358 U.S. 1,

legislatures have also become involved by formulating laws which change or in some manner affect school district boundaries.[29] These kinds of state action will often have a disproportionate impact upon blacks, creating the appearance of a dual school system; however, absent a showing of an intent or purpose to racially segregate, no remediable cause of action exists.[30]

The problem in northern cases becomes further compounded if, once de jure segregation within one district has been found, a desegregation order within that district would be futile. This situation typically occurs when a court believes that an intradistrict remedy either would accelerate "white flight" and create an identifiably black district[31] or would merely rearrange an already racially distinct district.[32] In view of this dilemma, the utility of fashioning an interdistrict metropolitan remedy becomes apparent. Under an interdistrict remedy, adjacent, usually white, districts are united in some manner with the offending district in order to cure the constitutional violation. The Indianapolis case revolves around this adjunct of the northern desegregation problem and exemplifies many of the problems surrounding the imposition of an interdistrict remedy.

III. Background of the Indianapolis Case

A. Segregation and Education in Indiana

Prior to its becoming a state, Indiana was a part of the Northwest Territory, an immense area of land ceded to the United States

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16 (1958). In Indiana, actions by school corporations are state actions because the schools are organized by the state's Department of Public Instruction. The state public school system is a state institution, thereby making the individual corporations agents of the state. United States v. Board of School Comm'rs, 332 F. Supp. 655, 659 (S.D. Ind. 1971).

[29]United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

[30]*See* Keyes v. School Dist. No. 1, Denver, 413 U.S. 189, 208 (1973). "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* (emphasis in original).

[31]United States v. Board of School Comm'rs, 332 F. Supp. 655, 676 (S.D. Ind. 1971). *See* text accompanying notes 68-69 *infra*.

[32]Milliken v. Bradley, 418 U.S. 717 (1974). In the *Milliken* case, the District Court abruptly rejected the proposed Detroit-only plans on the grounds that "while [they] would provide a racial mix more in keeping with the Black-White proportions of the student population [they] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation." *Id.* at 738-39.

by Virginia.[33] Pro-slavery forces existed in the Indiana area, even before the territorial cession, as a result of a combination of French, British, and Virginian colonial influences.[34] The pro-slavery factions were not defeated until statehood in 1816 when the state constitutional convention adopted an anti-slavery clause.[35] But old racial attitudes were slow to die, and the Indiana General Assembly, as well as the constitutional conventions of 1816 and 1851, promulgated patently discriminatory statutes, some of which were not repealed until 1965.[36] Blacks were separated from whites in most public places until after World War II[37] and were often the subject of private discrimination in the housing market.[38] Early Indiana legislators even went so far as to pass laws to exclude blacks and mulattos from the state altogether.[39] With this historical background, the problems that arose in education are easily understandable.

In Indiana, the right to education was traditionally considered a right conferred only upon white citizens of the state.[40] It was not until 1869, subsequent to the adoption of the fourteenth amendment to the United States Constitution, that education had to be provided for blacks,[41] and the initial legislation required separate schools for black students.[42] In 1877, the policy was made permissive by allowing integration when separate schools were not available.[43] In 1949, legislation was adopted which prohibited school segregation and included a gradual desegregation plan.[44] But by then, de jure segregation had already done its damage.

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[33]G. COTTMAN, CENTENNIAL HISTORY AND HANDBOOK OF INDIANA 37 (1915).

[34]B. BOND, JR., THE CIVILIZATION OF THE OLD NORTHWEST 154 (1934).

[35]*Id.* at 171. The anti-slavery clause that was adopted was from the Government Ordinance of 1787 which formed the basic colonial structure of the Territory. *Id.* at 10, 171. The clause had already been adopted in Ohio. *Id.* at 171.

[36]*Indianapolis I*, 332 F. Supp. at 660. One law, not repealed until 1965, declared marriages between whites and blacks void. 1 REV. STAT. ch. 67, § 2 (1852), *cited in* 332 F. Supp. at 660.

[37]332 F. Supp. at 661. Such places included public hospitals, theatres, and state parks. *Id.*

[38]*Id.* at 662-63.

[39]IND. CONST. of 1851, art. XIII, § 1 (1852), *cited in* 332 F. Supp. at 661.

[40]*See, e.g.*, Lewis v. Henley, 2 Ind. 332, 334-35 (1850).

[41]*Indianapolis I*, 322 F. Supp. at 663-64.

[42]Act of May 13, 1869, ch. 16, § 3, 1869 Ind. Acts 41. *See* note 9 *supra*.

[43]*See* note 47 *infra*.

[44]Act of Mar. 8, 1949, ch. 186, 1949 Ind. Acts 603 (currently codified at IND. CODE § 20-8.1-2-1 (1976)). This Act reads in part:

> [I]t is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex . . . and to abolish, eliminate and prohibit

The effect of the discriminatory legislative acts was most noticeable in larger urban areas, particularly Gary and Indianapolis, where the black populations were more concentrated and isolated. Although the school boards of both Gary and Indianapolis adopted policies that seemed to foster segregation, only Indianapolis has ultimately been the subject of a desegregation order.[45] The reason the focus has been on Indianapolis beomes apparent when one looks at the Indianapolis schools apart from the rest of the state.

B. Segregation in Indianapolis Schools

From the beginning of state-supported education in Indiana, de jure elementary school segregation existed in Indianapolis;[46] however, between 1877 and 1927, blacks and whites were allowed to go to the high school of their choice. Indianapolis high schools were integrated during this period because the city had no separate high schools for blacks, and the 1877 legislative amendment to the segregation statute allowed integration if there were no separate schools.[47] In 1927, at the instigation of the Indianapolis Chamber of Commerce, Crispus Attucks High School was opened, and all black high school students were compelled to attend that school regardless of the distance they were required to travel.[48] This new facility solidified and perpetuated the dual school system in Indianapolis. The school board failed to take advantage of the gradual desegregation plan offered by the legislature in 1949[49] and thus later encountered problems that might have been avoided.

One of the critical dates in the Indianapolis case was 1954 when *Brown I* was decided.[50] The Indianapolis school board, although adopting the policy of the 1949 statute, did not incorporate the true spirit

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segregated and separate schools or school districts on the basis of race, creed or color . . . .

Id. at § 1, 1949 Ind. Acts at 604. The desegregation of previously segregated schools was to be accomplished on a grade-by-grade basis so that effects of discrimination would be phased out rather than flatly abandoned. *Id.* at § 3, 1949 Ind. Acts at 604.

[45]An action was brought against the Gary schools in 1963, but the complaint was dismissed for lack of a constitutional violation. Schools in the city were racially identifiable, but the court of appeals attributed this circumstance to de facto causes and held that there was no intent to discriminate. Bell v. School City of Gary, 324 F.2d 209, 213 (7th Cir. 1963).

[46]*Indianapolis I*, 332 F. Supp. at 664.

[47]*Id.* The amendment stated in pertinent part "[t]hat in case there may not be provided separate schools for the colored children, then such colored children shall be allowed to attend the public schools with white children." Act of Mar. 5, 1877, ch. 81, § 1, 1877 Ind. Acts 124.

[48]332 F. Supp. at 664.

[49]*See* note 44 *supra.*

[50]332 F. Supp. at 657-58.

of school desegregation into its actions. Construction policies and transfer plans tended to minimize any efforts at desegregation by a board which, until 1949, had built separate schools in racially distinct neighborhoods and had completely segregated the schools' faculties.[51] In the 1952-53 academic year, the board froze attendance boundaries along racially segregated residential lines.[52] By 1954, the Indianapolis system was in the throes of nineteenth and twentieth century de jure segregation and could well have been one of the test cases in *Brown I*.

The other crucial date in the litigation, as in most desegregation cases,[53] was the time of trial in 1968. Between 1954 and 1968, the Indianapolis school board's policies tended to maintain the dual nature of the 1954 system as well as create new segregative conditions. As racially identifiable neighborhoods grew, the school board added new schools or enlarged existing schools in line with the racial composition of the neighborhood.[54] Thus, racially identifiable schools were created and perpetuated. Other segregative actions by the school board included using optional attendance zones,[55] busing students to same-race schools when other schools were closer,[56] and changing attendance boundaries approximately 350 times, with ninety percent of those changes furthering segregation.[57] The board was not wholly to blame for the perpetuation of the dual system within IPS during this period. The board faced a radically changing racial population,[58] new low-rent housing projects,[59] and lack of cooperation by local officials with respect to zoning and use of city land for schools.[60] However, only the school board's actions became the initial focus of litigation that lasted twelve years.

C. The Indianapolis Litigation

In 1968, the United States Department of Justice brought suit in the federal district court for the Southern District of Indiana against the Indianapolis school board alleging denial of equal protec-

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[51]*Id.* at 665-66.

[52]*Id.*

[53]The 1979 Supreme Court opinions concerning Columbus, and Dayton, Ohio, give less weight to the condition of a school system at the time of trial if de jure segregation existed in 1954 and had not been completely dismantled at the time of trial. *See* text accompanying notes 149-55 *infra*.

[54]332 F. Supp. at 667-69.

[55]*Id.* at 668.

[56]*Id.* at 669.

[57]*Id.* at 670.

[58]*Id.* at 672-73.

[59]*Id.* at 673-74.

[60]*Id.* at 674.

tion of the laws.[61] In light of the actions taken by the board both before and after *Brown I*, the trial court had no difficulty inferring the necessary segregative intent and holding that the board, acting as agent of the state of Indiana, was maintaining a de jure segregated school system at the time of trial.[62] The decision upon the issue of segregation was quickly rendered credible by its affirmation in the Seventh Circuit Court of Appeals and the subsequent denial of certiorari by the Supreme Court.[63] The *remedy* suggested in *Indianapolis I* by District Judge Dillin was the real source of controversy: Proper desegregation of the Indianapolis public schools would be best achieved by an interdistrict remedy.[64]

An interdistrict remedy had rarely been suggested or ordered before 1971.[65] District Judge Dillin, to test the efficacy of such relief, established an interim order for immediately dismantling the dual system within the Indianapolis district (IPS) and required the plaintiff to secure the joinder of outlying school districts as parties defendant to better facilitate the shaping of an interdistrict remedy.[66] The court's rationale was that desegregation within the district itself just would not be effective—"in the long haul, it won't work."[67] Because 98.5% of the black population of the county lived within IPS,[68] the judge feared that desegregation of only those schools would soon result in an undesirable racial balance of forty percent minority pupils in the schools, leading to increased "white flight."[69] Therefore, combining outer, basically white, districts with IPS would be the most effective remedial measure.

The basis for this preliminary decision was a piece of Indiana legislation passed in 1968, which prevented the growth of the IPS district into predominantly white residential areas. The General

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[61]*Id.* at 656. The Justice Department is empowered to bring an action under the Civil Rights Act of 1964 in school desegregation cases. 42 U.S.C. § 2000c-6(a), (b) (1976).

[62]332 F. Supp. at 677-78.

[63]*See* United States v. Board of School Comm'rs, 474 F.2d 81, 88 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). *See generally* Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case*, 9 IND. L. REV. 897, 932-33 (1976).

[64]332 F. Supp. 680-81.

[65]An interdistrict remedy had been ordered the year before in Arkansas when a white district was forced to annex a smaller black district because the boundaries had been drawn with the intent to segregate. Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1970).

[66]332 F. Supp. at 679-81.

[67]*Id.* at 678.

[68]*Id.* at 663.

[69]*Id.* at 676. Judge Dillin believed that a 40% tipping factor would create an identifiably black district rather than just a dual system. *Id.*

Assembly's action, informally entitled "Uni-Gov,"[70] allowed governmental reorganization in Indiana counties having first-class cities.[71] Indianapolis, being the state's only first-class city, was consolidated with most of the other civil governments in Marion County[72] in order to have a larger pool of resources for metropolitan planning and problem-solving.[73] In Indiana, the boundaries of any school system were traditionally and statutorily coterminous with any annexations to the civil city.[74] However, two weeks before Uni-Gov was approved, the legislature repealed the part of the statute providing for the expansion of school district lines in first-class cities.[75] Thus, IPS remained frozen with the old city boundaries and could not expand to include those outer districts which were, by 1968, becoming identifiably white.[76] The principal controversy after the Supreme Court refused to hear *Indianapolis I* was the legality of the interdistrict remedy which was necessary to overcome the impact of Uni-Gov.

Indianapolis II[77] and *Indianapolis III*[78] included the outlying school districts within and without Marion County as added defendants. The district court confirmed its choice of remedy by finding that an Indianapolis-only plan would be unsatisfactory.[79] Further, although the outlying districts had every right to resist school reorganization into one metropolitan system, they were nevertheless required to comply with an interdistrict remedy because the frozen IPS boundary lines made desegregation within the district virtually impossible.[80] District Judge Dillin then granted interim relief from busing blacks out of IPS in order to afford the legislature time to

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[70]Consolidated First-Class Cities and Counties Act, ch. 173, 1969 Ind. Acts 357 (codified at IND. CODE §§ 18-4-1-1 to -5-4 (Supp. 1980)).

[71]Dortch v. Lugar, 255 Ind. 545, 560, 266 N.E.2d 25, 35 (1971). In this case, the Indiana Supreme Court upheld the constitutionality of the Act. *See generally* 47 IND. L.J. 101 (1971).

[72]Beech Grove, Lawrence and Speedway were officially excluded for most purposes except for the right to vote in Indianapolis elections. *Indianapolis I*, 332 F. Supp. at 676 n.93.

[73]*See* 47 IND. L.J. 101, 102 (1971).

[74]Act of Mar. 9, 1931, ch. 94, § 1, 1931 Ind. Acts 291.

[75]IND. CODE §§ 20-3-14-1 to -11 (1976). In these sections, Act of Mar. 6, 1961, ch. 186, 1961 Ind. Acts 101 was amended by Act of Feb. 25, 1969, ch. 52, 1969 Ind. Acts 57.

[76]*See* 332 F. Supp. at 663.

[77]368 F. Supp. 1191 (S.D. Ind. 1973).

[78]368 F. Supp. 1223 (S.D. Ind. 1973), *rev'd in part, aff'd in part, and remanded*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

[79]*Indianapolis II*, 368 F. Supp. at 1198.

[80]*Id.* at 1203-04. By 1973, the date of *Indianapolis II* and *III*, IPS was already 41.1% black, indicating to Judge Dillin that perhaps the tipping point in the city was much lower than he had originally believed. *Id.* at 1198.

formulate some kind of permanent plan to effect school desegregation in Marion County.[81] On appeal, the Seventh Circuit Court of Appeals reversed the lower court's decision with respect to districts outside Uni-Gov boundaries and remanded the rest of the case[82] for reconsideration in light of the recent Supreme Court decision in *Milliken v. Bradley*.[83]

In *Milliken*, the Court reversed an interdistrict metropolitan remedy in Detroit and demanded that an interdistrict constitutional violation be shown before such relief could be granted. "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[84] Therefore, on remand of the Indianapolis case, the district court was required to find not only segregative effect but also an actual constitutional violation causing that condition.

In the 1975 district court decision in *Indianapolis IV*,[85] the Housing Authority of the City of Indianapolis (HACI) was an added defendant. The agency had been joined because all low-rent housing projects built under its auspices were within the IPS boundaries although it had the authority to build within five miles of the city limits.[86] Further evidence was heard on "the effect . . . of housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS."[87] Ultimately, Judge Dillin held that a limited interdistrict remedy[88] was warranted by the additional evidence and

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[81]*Id.* at 1208. The court outlined possible alternatives available to the legislature in its *Indianapolis III* supplemental memorandum. *Indianapolis III*, 368 F. Supp. 1223.

[82]503 F.2d 68, 86 (7th Cir. 1974).

[83]418 U.S. 717 (1974).

[84]*Id.* at 745.

[85]419 F. Supp. 180 (S.D. Ind. 1975).

[86]*Id.* at 182.

[87]*Id.* This evidence was heard in accordance with Justice Stewart's concurring opinion in *Milliken*:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . [by] transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

418 U.S. at 755.

[88]*Indianapolis IV*, 419 F. Supp. at 183. The remedy was limited to transferring black students out of IPS. The Indiana legislature by that time had passed a law that accommodated such a remedy with the transferor district paying the transferee districts for tuition. IND. CODE §§ 20-8.1-6.5-1 to -10 (1976).

the "violation" of Uni-Gov, and he enjoined HACI from locating any more housing within IPS boundaries.[89] This decision satisfied the court of appeals. The Supreme Court, however, caught in a revolution of the law of equal protection, vacated and remanded the case for reconsideration in light of two then recent decisions concerning discriminatory intent.[90]

IV. The Indianapolis Remedy and Segregative Intent

The Supreme Court referred the lower courts to the equal protection cases of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[91] and *Washington v. Davis*.[92] Neither of these cases deal with school desegregation,[93] but both were important with respect to the determination of segregative intent.

In view of *Arlington Heights* and *Davis*, the discriminatory intent in IPS's practices and the disproportionate impact of Uni-Gov and HACI actions could not support an interdistrict remedy without a showing of a *purposeful* interdistrict violation.[94] In *Indianapolis V*,[95] therefore, the district court was required to look for segregative

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[89]419 F. Supp. at 183, 186.

> The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein . . . .

Id. at 182-83.

[90]*Indianapolis IV*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded sub nom.* Bowen v. United States, 429 U.S. 1068 (1977), *cert. denied*, 439 U.S. 824 (1978). Circuit Judge Tone's dissent in the court of appeals opinion foreshadowed the subsequent Supreme Court decision. 541 F.2d at 1224.

[91]429 U.S. 252 (1977).

[92]426 U.S. 229 (1976).

[93]*Arlington Heights* involved a claim of residential zoning discrimination. In *Washington v. Davis*, the plaintiffs alleged discrimination in the hiring practices of the Washington, D.C. metropolitan police department.

> [94] The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.

Washington v. Davis, 426 U.S. at 240 (1976).

[95]456 F. Supp. 183 (S.D. Ind. 1978).

intent in those acts which tended to prevent effective metropolitan desegregation. The court did not have to find that segregative intent was the *sole* motivation for the acts—the existence of *any* segregative intent would support an interdistrict remedy.[96]

The court's burden was further lessened because there was no need to find that the outer districts had intentionally contributed to or caused the IPS school segregation. This requirement, established by the Court in *Milliken*,[97] was obviated by the Indiana General Assembly which had provided an interdistrict transfer remedy that could be imposed without culpability of the transferee districts.[98] Thus, *Indianapolis V* dealt exclusively with finding segregative intent in Uni-Gov and HACI actions.

There were neither facially discriminatory statutes nor express statements of racial purpose present so the district court examined Uni-Gov and HACI using methods by which intent could be inferred. The court began its inquiry by examining the disproportionate impact of both forces.[99] It reasoned:

> "The impact of the official action—whether it 'bears more heavily on one race than another,' . . . —may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . ."[100]

After looking at impact, the trial court, using criteria suggested in *Arlington Heights*, examined the passage of Uni-Gov for evidence of a segregative purpose.[101] This standard generally guides a court in

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[96] [A plaintiff is not required] to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Dev. Corp., 429 U.S. at 265 (footnote omitted).

[97] Milliken v. Bradley, 418 U.S. at 745. In *Milliken*, the Court stated that a constitutional violation could be proven either by discriminatory acts in one district causing segregation in an adjacent district or by racially identifiable district lines drawn by the state. *Id.*

[98] *Indianapolis V*, 456 F. Supp. at 190-91. The statute provides that pupil transfers can be effectuated if: (1) the transferor corporation has violated equal protection, (2) a unitary system cannot be implemented within the offending corporation, and (3) the court is compelled to order such transfers under the fourteenth amendment. IND. CODE § 20-8.1-6.5-1 (1976).

[99] 456 F. Supp. at 185.

[100] *Id.* (quoting 429 U.S. at 266).

[101] The *Arlington Heights* case suggests that, besides impact, five other factors could be relevant to inferring intent: (1) the historical background of the decision,

considering the "totality of the relevant facts"[102] from which it can glean an inference of intent. In the instance of Uni-Gov, there was convincing evidence that segregation had been a factor in the decision to freeze the IPS boundaries. First, the court recounted the history of white-black relations in Indiana as well as that of Indianapolis' dual school system.[103] It then considered the sequence of events leading to the adoption of the Uni-Gov act and emphasized that the partial repeal of the statute allowing expansion of school boundaries occurred just prior to passage of Uni-Gov.[104] Moreover, the court heard testimony to the effect that the act would not have been passed if IPS were to grow with the city.[105] Next, District Judge Dillin examined substantive departures from prior policy. The legislature had been eliminating remnants of racially discriminatory laws since 1949 when it appeared to reverse that progress by repealing the pertinent section of the annexation statute.[106] From this pattern of behavior, the district court found that Uni-Gov was passed, at least in part, with the purpose of maintaining interdistrict school segregation.[107]

The court found segregative intent in the actions of HACI in a different manner. Using a test employed by the Sixth Circuit[108] and other courts of appeals, District Judge Dillin held that a presumption of segregative intent was raised because the "natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS."[109] HACI failed to affirmatively establish that its policies were racially neutral, and it too was found to have committed an interdistrict constitutional violation.[110]

To remedy these intentional violations, the district court enjoined HACI from further building within IPS and reinstated its 1975 order to transfer a certain percentage of blacks from IPS to the

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(2) any "specific sequence of events leading up to the challenged decision," (3) substantive departures in policy, (4) departures from usual procedure, and (5) any administrative or legislative history. 429 U.S. at 267-68.

[102]Washington v. Davis, 426 U.S. at 242.

[103]456 F. Supp. at 186-87.

[104]*Id.* at 187.

[105]*Id.* This testimony was given by then-Mayor Richard Lugar.

[106]*Id.* at 188.

[107]*Id.*

[108]*See* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[109]456 F. Supp. at 189.

[110]*Id.*

outlying districts within Uni-Gov's boundaries (the county lines).[111] The court determined the number of pupils to be transferred by calculating approximately how many children would have gone to schools in outlying districts absent the HACI violation.[112]

Except with respect to two districts within Uni-Gov limits,[113] the Seventh Circuit Court of Appeals affirmed the lower court's order[114] by holding that the interdistrict remedy was justified because of the violations by both Uni-Gov and HACI.[115] The court also stated that the form of the order was proper in light of the "specific incremental effects" of HACI's actions.[116] The court of appeals emphasized that even though there would be some difficulty determining the exact segregative effects attributable to Uni-Gov alone, a remedy could have been ordered commensurate with the impact.[117] The opinion further indicated that the lower court had the power, if necessary, to transfer students from outlying districts into IPS because the state action had had interdistrict effects.[118] Whether these measures will be implemented is difficult to determine. Nonetheless, the district court's order was deemed effective on October 6, 1980, when the Supreme Court denied certiorari.[119]

V. School Desegregation and Segregative Intent

A. Generally

The various dispositions of the Indianapolis case demonstrate the difficulty inherent in finding segregative intent in desegregation cases. In accordance with *Keyes*, segregative intent must be found in order to establish a constitutional violation.[120] Courts have had little difficulty discovering segregative intent in the South because of

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[111]*Id.* at 191.

[112]*Id.* at 190. This approach had recently been approved by the Supreme Court in Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). The Court remanded the case to the district court to limit the desegregation remedy to effect the school distribution that would have been present without the constitutional violation. *Id.* at 420-21.

[113]The Beech Grove and Speedway judgments were vacated and remanded to determine whether HACI had jurisdiction to operate in those locales. United States v. Board of School Comm'rs, 637 F.2d 1101, 1116 (7th Cir.), *cert. denied*, 101 S. Ct. 114, 115 (1980).

[114]*Id.* at 1117.

[115]*Id.* at 1111.

[116]*Id.* at 1112-14.

[117]*Id.* at 1113.

[118]*Id.* at 1115.

[119]Bowen v. Buckley, 101 S. Ct. 114 (1980).

[120]*See* text accompanying notes 21 & 22 *supra*.

numerous facially discriminatory actions.[121] To date, however, the Court has not explained how lower courts in northern cases are to find segregative intent absent such actions. Instead, the Court refers them to non-school cases such as *Arlington Heights*[122] (housing/zoning) and *Washington v. Davis*[123] (employment). Thus, lower tribunals are left to their own devices in finding purposeful segregation in school cases.

Another reason courts have experienced difficulty finding segregative intent in school cases is that the case law is still evolving. The body of decisions regarding this requirement is growing but is by no means creating a logical pattern.

1. Methods of Finding Intent.—Courts and commentators generally discern two separate approaches for finding segregative intent: the subjective method and the objective method. However, these labels are actually misnomers. The categories are better named for the type of evidence used by the courts in finding segregative intent: direct evidence and indirect evidence.

The purported subjective approach for finding discriminatory intent involves the examination of the "subjective" motivation of the officials promulgating the actions.[124] Intent is established under this theory by means of direct evidence of discriminatory motives. Such evidence includes facially discriminatory statutes and overt expressions of racial motivation made by the persons involved in the decision-making.[125] However, it is highly unlikely that there actually is a test for subjective motivation; segregative intent *is* subjective motivation. Facially segregative actions are automatically unconstitutional because segregation is not a proper legislative goal. When the motivation is not readily apparent, however, other factors have to be entered into evidence from which an actor's subjective motivation, or intent, can be inferred.[126] Courts then use indirect indicia of intent which can be used as evidence of motivation.

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[121]*See generally* text accompanying notes 9 & 10 *supra*.

[122]429 U.S. 252 (1977).

[123]426 U.S. 229 (1976).

[124]*See* Comment, *Proof of Racially Discriminatory Purpose under the Equal Protection Clause*: Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L.L. REV. 725, 733 (1977); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 321 (1976).

[125]Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (pattern of segregative action included "statements of express intention not to counter anti-integration sentiment").

[126]One court has expressly stated this concept. "[W]e treat the District Court's finding of a lack of racial motivation as irrelevant in the face of his findings of foreseeable effect [based on objective evidence]." Hart v. Community School Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975).

Indirect evidence of segregative intent includes such acts as gerrymandered boundary lines and free transfer systems. These acts can be motivated by legitimate objective educational reasons as well as by covert segregative intent, hence the term "objective" approach. However, when direct evidence of discrimination is not available, courts must rely on this indirect evidence to infer segregative intent. Thus, it is apparent that courts do not rely on subjective or objective approaches to find segregative intent. Rather, they rely upon the two types of evidence these approaches are based on.

Finding intent from indirect evidence is the most commonly used approach in northern desegregation cases.[127] This method has given rise to several so-called "objective" tests and is, for that reason, the more successful procedure for finding segregative purpose in widely differing fact situations. The analysis using indirect evidence has been called "objective intent,"[128] "institutional intent,"[129] the "foreseeability test,"[130] "cumulative violation,"[131] "the *Omaha* presumption,"[132] and even "totality of the facts" test.[133] Regardless of the name appended to it, the approach is essentially the same: The court looks at what was done, how it was done, and who was affected.

One of the indirect analyses that has been used successfully is whether segregation or maintenance of existing segregation was a natural, foreseeable result of the official action.[134] Another of the more comprehensive indirect analyses is for a court to look at patterns of official conduct, such as drawing school attendance lines that maintain or increase segregation[135] or planning school construction.[136] Such patterns are not mutually exclusive, and many practices that tend to segregate are often combined and viewed as a whole. For such a case, the decision in *Washington v. Davis*[137] suggests that "an invidious discriminatory purpose may often be inferred from the

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[127]*See, e.g.*, cases cited notes 134-36 & 141 *infra*.

[128]*See* Note, *supra* note 124, at 328.

[129]*Id.* at 334.

[130]*See* Comment, *supra* note 124, at 732.

[141]*Id.* at 734.

[132]*Id.* at 735.

[133]Note, *Finding Intent in School Segregation Constitutional Violations*, 28 CASE W. RES. L. REV. 119, 162 (1977).

[134]NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); United States v. School Dist., 521 F.2d 530, 535 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Hart v. Community School Bd. of Educ., N.Y. School Dist. #21, 512 F.2d 37, 50 (2d Cir. 1975); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[135]Booker v. Special School Dist. No. 1, Minneapolis, 351 F. Supp. 799, 808 (D. Minn. 1972).

[136]Morgan v. Kerrigan, 509 F.2d at 592-93.

[137]426 U.S. 229 (1976).

totality of the relevant facts."[138] Similarly, a court can find that a school board was motivated, at least in part, by a segregative purpose by looking for "institutional intent." This route is very much like the one used in *Arlington Heights*[139] and *Indianapolis V* except that the court looks solely at the acts of the school board and at whether a less segregative alternative is available absent a strong educational justification for the choice made.[140] The various tests also subsume a method known as "the *Omaha* presumption" in which a presumption of intent arises when official acts or omissions have created a foreseeably segregative condition. The presumption may only be rebutted if the defendant board can establish that discriminatory intent was not a motivating factor.[141] Though this method was used in *Indianapolis V* for the HACI offense, the Supreme Court questioned the validity of this presumption in 1979.[142] It appears, therefore, that the prior success of this test is probably attributable to the weight of the indirect evidence.

Although each test has distinctive features, they are virtually interchangeable and often not clearly distinguishable. Rather than searching for the "best" method or waiting for the Supreme Court to select one, courts have required plaintiffs to bring forth as much evidence as possible that appears to indicate segregation. The courts have then judged that evidence by whatever method suits their tastes or as equitably as possible. Generally, school boards which have engaged in a great number of suspect acts will be required to dismantle the effects of those acts. Fewer and unconnected actions will usually not require a remedy because they are often explainable by de facto conditions. Whatever approach is used, the Supreme Court has usually demonstrated its amenability to the approach by denying certiorari.[143]

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[138]*Id.* at 242.

[139]*See* note 101 *supra.*

[140]*See* Note, *supra* note 124, at 334-35.

[141]United States v. School Dist., 521 F.2d 530, 535-36 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *See generally* Note, *Intent to Segregate: The* Omaha *Presumption*, 44 GEO. WASH. L. REV. 775 (1976); Comment, *supra* note 124, at 735.

[142]Referring to the Sixth Circuit's emphasis upon *Oliver v. Michigan State Bd. of Educ.*, the Court said:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants.

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979).

[143]*See* cases cited notes 125, 134 & 171.

2. Recent Trends in the Supreme Court.—The Court's tacit approval speaks well of the lower courts' treatment of such a sensitive issue, but it also indicates wise restraint from establishing any one standard as the rule. Because of the great disparity in the history, school organization, disputed official acts, and other facts relevant to each case, a single rule would be virtually impossible to formulate.

The Court's restraint is even more apparent when one considers some of the decisions from the Fifth Circuit. Because it is situated in the South, this particular court of appeals has had to deal with numerous school desegregation cases.[144] The constitutional issue, as that court views it, does not necessarily depend upon the de jure/de facto distinction drawn by the Supreme Court in *Keyes*. The court in *Cisneros v. Corpus Christi Independent School District*[145] stated that "while [discriminatory motive and purpose] may reinforce a finding of effective segregation, [they] are not necessary ingredients of constitutional violations in the field of public education. We . . . hold that the racial and ethnic segregation that exists . . . is unconstitutional—not de facto, nor de jure, but unconstitutional."[146]

The *Keyes* decision, requiring intent, would seem to preclude reliance on *Cisneros*. However, the Court declined to hear *Cisneros* four days *after* the decision in *Keyes* was handed down. Commentators[147] and at least two Justices[148] have suggested either that the de jure/de facto distinction has no merit or that de facto segregation should be dismantled also. Generally, their arguments are the same: Segregation is just as harmful whether it is de facto or de jure.

Although the Supreme Court has never espoused the Fifth Circuit's approach, two recent cases have diminished the significance of the de jure/de facto distinction to some extent. In *Columbus Board of Education v. Penick*[149] and *Dayton Board of Education v. Brinkman (Dayton II)*,[150] the Court in essence ruled that if racially identifiable schools existed in 1954 and still exist at time of trial, the school board has failed in its affirmative duty to dismantle the dual

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[144]*See generally* F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH xii, 565-72 (1978).

[145]467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973).

[146]*Id.* at 149.

[147]*See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); 40 N.Y.U.L. REV., *supra* note 10; Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304 (1973).

[148]In *Keyes*, both Justices Powell and Douglas decried the use of the distinction because it did not ameliorate segregation caused by a neighborhood school policy where there was private housing discrimination. 413 U.S. at 214-53.

[149]443 U.S. 449 (1979).

[150]443 U.S. 526 (1979).

system, and an appropriate remedy must be imposed.[151] The determination of present intent in the Columbus and Dayton districts was based upon the foreseeable consequences and impact of official actions which showed that the boards were perpetuating past segregative practices rather than eliminating them.[152] This method of finding present intent was approved as early as 1973, in *Keyes*, when the Court stated that:

> a connection between past segregative acts and present segregation may be present even when not apparent . . . . Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition . . . .[153]

The approach in *Columbus* and *Dayton II* is best described in a recent review:

> The approach to . . . school desegregation that the Supreme Court endorses . . . has four elements: first, the existence of identifiably black schools in the school system in 1954[;] . . . [s]econd, a legal determination that the existence of such schools in 1954 . . . [created] a continuing constitutional duty to eliminate identifiably black schools[;] . . . [t]hird, an intensive and detailed examination of school system actions since 1954 in order to determine whether the school system has taken all feasible actions to eliminate the identifiably black schools[;] . . . [f]ourth, the conclusion that the only way to eliminate the identifiably black character of some schools is to modify the neighborhood school policy through appropriate racial transfers . . . so that no school has a distinctly black enrollment . . . .[154]

The Court's current view, then, is that when a district combines the vestiges of a 1954 de jure situation with actions which have the foreseeable consequence of disparate racial impact, the system has not been effectively dismantled. The Court may have "accepted" any mode of finding intent so long as a lower court's decision was not clearly erroneous, but its focus since *Brown I* has been primarily

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[151]443 U.S. at 461; 443 U.S. at 541.

[152]443 U.S. at 464; 443 U.S. at 536 n.9.

[153]413 U.S. at 211.

[154]Kitch, *The Return of Color-Consciousness to the Constitution:* Weber, Dayton, *and* Columbus, 1979 SUP. CT. REV. 1, 2-3 (1980).

upon a school board's affirmative duty to dismantle a dual system rather than the board's purpose in maintaining it.[155]

It is with reference to this attitude that the Indianapolis interdistrict remedy can be understood. Circuit Judge Tone's 1979 dissent in *Indianapolis V* is probably more correct than the majority's rationale when he states that "today's decision cannot, I think, be reconciled with the distinction between *de jure* and *de facto* segregation."[156] The Court's current trend away from the importance of the de jure/de facto distinction explains part of the reason why the Indianapolis remedy was not overturned. The Court's disposition of the Indianapolis case is further understood when one considers other interdistrict cases.

B. Interdistrict Remedies

1. Interdistrict Remedy and Segregative Intent.—Milliken v. Bradley[157] is the first and essentially the only opinion by the Supreme Court on the interdistrict remedy and public schools. According to *Milliken*, plaintiffs must show an interdistrict violation with an interdistrict effect in order to obtain such a remedy.[158] Typically, intentional acts of an adjacent school district or racially drawn district lines constitute such a violation and elicit the necessary effect.[159] In *Milliken*, the Court could find neither type of violation.[160] Detroit, therefore, had to dismantle its own de jure system, but as a district it remained identifiably black.[161]

Many courts have tried to avoid this result, especially in the North where urban areas have a great concentration of minorities. Their cure for the problem has often been to initially suggest, and even order, interdistrict relief as soon as they find that the "city" district is operating a dual system. The interdistrict actions found to support the remedy generally fall into one, if not both, of the *Milliken* categories—district actions or legislative redistricting.

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[155]Keyes v. School Dist. No. 1, Denver, 413 U.S. at 220-21 (Powell, J., concurring in part and dissenting in part); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 (1968) ("School Boards such as the respondent then [1954] operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

[156]*Indianapolis V*, 637 F.2d at 1130.

[157]418 U.S. 717 (1974).

[158]*Id.* at 744-45.

[159]*Id.* at 745. *See* text accompanying note 84 *supra*.

[160]418 U.S. at 748.

[161]*Id.* at 759.

There is also the occasional anomaly, as in Indianapolis, in which housing is deemed to create an interdistrict effect. However, for a court to order any interdistrict remedy, it must find the interdistrict act violative. That is, the act must be accompanied by segregative intent.

Segregative intent, as well as an interdistrict act, were missing in *Milliken*. As in the intradistrict cases, however, the Court failed to elucidate the standards a court is to use to determine segregative intent. Thus, courts are left with the same direct and indirect methods used in finding intradistrict violations. In some cases, these methods are appropriate; in others, their use seems less reliable, if they are actually used at all.

2. Interdistrict Violations by School Districts.—The easiest interdistrict violations to ascertain are those that are blatantly, if not expressly, segregative in purpose. The interdistrict order in Louisville[162] was designed to remedy just such practices. The Louisville district was one of three school districts in Jefferson County, two of which were operating state-mandated dual systems at the time of trial.[163] Before *Brown I*, the two latter districts had actively engaged in segregative practices by disregarding boundary lines and transferring blacks into an inner city school for blacks because the county system had no such school.[164] The lines were also ignored when one high school, belonging to the Louisville district, was built within another district's system, and white students from both districts attended it.[165] In an action for interdistrict relief, the court held that prior disregard for district lines "for the purpose and with the actual effect of segregating school children among the public schools of the county on the basis of race" required an interdistrict remedy.[166]

School boards have been involved in other more ingenious methods of segregation, some of which did not require courts to infer intent. In *Lee v. Macon County Board of Education*[167] and *Wright v. Council of Emporia*,[168] boards attempted to secede from county-wide

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[162]Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

[163]510 F.2d at 1359-60.

[164]*Id.* at 1360.

[165]*Id.*

[166]*Id.* at 1361. The court also believed the remedy appropriate because the school boundaries and city limits of Louisville were not coterminous, and the presence of almost 10,000 children, mostly white, between the two lines aggravated the problem. *Id.*

[167]448 F.2d 746 (5th Cir. 1971).

[168]407 U.S. 451 (1972).

desegregation plans. In each case, the court focused upon the adverse effects of the action which would ultimately have created an interdistrict violation if allowed to attain fruition.[169] As stated by the court in *Lee*, "The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on the desegregation of the county school district."[170] The violation was actually prevented in both of these cases, but their precedential value is in their analyses. The courts' relative indifference to the element of intent in these cases explains, to a certain extent, the acceptability of decisions in which legislatures were involved. Courts have often looked to the segregative effect as of utmost importance, with segregative purpose as a secondary consideration.

3. Interdistrict Violations by State Legislatures.—Several interdistrict violations have been found and corrected within the second *Milliken* category in which the state legislature or the state school board, rather than the local school district, has promulgated a violative policy or statute. Violations of this nature usually involve the drawing or redrawing of district lines, but the manner of finding intent sometimes differs.

The Eighth Circuit has been particularly active in correcting segregation flowing from legislative actions. In *Haney v. County Board of Education*,[171] a 1970 Arkansas case, the Eighth Circuit Court of Appeals ordered the annexation of a black school district to a larger, more populous, white district in order to achieve a "unitary non-racial school system."[172] A prior opinion in the litigation justified the remedy in this fashion: Because the state of Arkansas had required separate schools for blacks and whites,[173] school district lines drawn for school reorganization had racial contours and were violative as a matter of law because they were a reflection of that earlier policy.[174]

Five years later, in *United States v. Missouri*,[175] the Eighth Circuit again ordered annexation of a racially identifiable school district.[176] The district in question had been separated from the

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[169]448 F.2d at 752; 407 U.S. at 462.

[170]448 F.2d at 752.

[171]429 F.2d 364 (8th Cir. 1970).

[172]*Id.* at 369.

[173]Haney v. County Bd. of Educ., 410 F.2d 920, 923-24 (8th Cir. 1969).

[174]*Id.* at 926. The school districts were not required to be distinctly separate, "[b]ut the fact that the various reorganized districts in Sevier County reflect a bi-racial system of education by district lines must be accepted as more than mere coincidence." *Id.* at 924.

[175]515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

[176]515 F.2d at 1373.

other adjacent districts in 1937 and had been excluded ever since from reorganization plans formulated by the county and state.[177] The court ordered its annexation with two adjoining districts on the basis of intent as found in *Keyes*, and later in *Columbus* and *Dayton II*:[178] "Intentional school segregation in the past may not be ignored in assessing the impact of present inaction which has the effect of maintaining segregation."[179]

Very recently, another Arkansas case was decided which involved a fact situation similar to that in *Haney*—district lines were drawn as a reflection of the same statute. But in *Morrilton School District No. 32 v. United States*,[180] rather than finding purpose as a matter of law the court of appeals followed much the same reasoning as was used in *United States v. Missouri*. It found that the impact of the discriminatory statute was still being felt;[181] therefore, sufficient intent was present to justify an interdistrict remedy to eliminate all vestiges of state-imposed segregation.[182]

An interesting and distinctively northern case in which both the school board and legislature created the need for an interdistrict remedy is *Evans v. Buchanan*.[183] That case dealt with the school segregation situation within and without Wilmington, Delaware.

Delaware, at one time, had state-imposed segregation.[184] Even after *Brown I*, New Castle County schools were involved in a transfer system across district lines[185] which, as in Louisville, established a certain amount of interdependence among the districts. For many years, the only high school in the county that would accept black students was in Wilmington itself. Consequently, cross-district transportation of blacks was required.[186] Also, the district court in *Evans* found that various governmental authorities had contributed to the racial disparity between the city and the rest of the county,[187] in much the same manner the district court in *Indianapolis*

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[177]*Id.* at 1370.

[178]*See* text accompanying notes 149-55 *supra*.

[179]515 F.2d at 1370.

[180]606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

[181]606 F.2d at 225-26.

[182]*Id.* at 228-29.

[183]393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975). The litigation began as one of the companion cases in *Brown I* under the designation, Belton v. Gebhart, 32 Del. Ch. 343, 87 A.2d 862 (1952). Because there have been so many reported opinions, this Note will confine itself to the district court opinions which found the constitutional violation to require interdistrict relief and which granted the remedy.

[184]393 F. Supp. at 432.

[185]*Id.* at 433.

[186]*Id.*

[187]*Id.* at 438. This action helped create a situation whereby 75% of the county's black students attended school in Wilmington. *Id.* at 439.

IV had found HACI actions segregative.[188] These violations included acts by the New Castle County Housing Authority[189] and discrimination in the private housing market sanctioned by state officials until 1968.[190] One of the more decisive factors in the *Wilmington* case, however, was the passage of the Education Advancement Act of 1968.[191] This Act provided for school reorganization throughout the state with the exception of Wilmington. The Act also included factors to be considered when reorganizing but failed to include any criterion for reorganization on the basis of race. Therefore, the court held that the statute created a suspect racial classification[192] which contributed to segregation by maintaining district lines on the basis of race.[193]

In addition to the segregative cross-district transactions, the court inferred segregative intent from the impact of all the other more "neutral" actions.[194] On the basis of these violations, the court declared pertinent provisions of the legislative act "nonconstitutional"[195] and, a year later, ordered the consolidation of most of the county's school districts.[196]

From these representative cases, it is evident that determining intent when considering an interdistrict remedy is a much less strenuous task once intradistrict de jure segregation has been found. A court's emphasis is upon the additional segregative impact of the official actions rather than upon the purpose for which they were formulated. Attributing such importance to impact is consistent with the renewed Supreme Court attitude that the affirmative duty to dismantle de jure segregation will not allow any hindrance or inaction to stop its full fruition. The Indianapolis case came at the right time and involved the right type of violation.

VI. Analysis of the Indianapolis Case

A. Non-Educational Violations

The Indianapolis litigation has one component present in few other cases: the state actions which affected school desegregation were only tangentially concerned with education.

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[188]*See* note 87 *supra* and accompanying text.

[189]393 F. Supp. at 435.

[190]*Id.* at 434.

[191]56 Del. Laws, ch. 292, § 6 (1968) (current version at Del. Code Ann. tit. 14, §§ 1001 to 1005 (Supp. 1980)).

[192]393 F. Supp. at 442.

[193]*Id.* at 445-46.

[194]*Id.* at 438, 442-43.

[195]*Id.* at 447.

[196]Evans v. Buchanan, 416 F. Supp. 328, 353 (D. Del. 1976).

The two factors purporting to cause interdistrict segregation in the schools—Uni-Gov and HACI—did not have the educational emphasis that school board actions or legislative redistricting have had. The district court could have found a legitimate state purpose for the creation of Uni-Gov and could have corrected the housing violation without taking affirmative action with respect to the schools.

Metropolitan reorganization and public housing can have a distinct impact upon a school system, but their purposes are to affect altogether different aspects of society. If there were a segregative intent involved in these kinds of decisions, their cure would eventually eliminate their respective constitutional violations as well as school segregation. Cases have arisen which deal with these kinds of state actions individually. One case has even demonstrated that the issue of school desegregation does not alter the consideration of such a state action on its own merits.[197]

In *Higgins v. Board of Education*,[198] the Sixth Circuit confronted a situation much like the problem encountered with Uni-Gov. The reasoning of this case could have been used to justify the propriety of maintaining pre-existing school district boundaries within Uni-Gov. The Michigan legislature passed a senate bill which changed prior law by preventing the boundaries of a school district from expanding with civil annexation in second-class cities.[199] Certain suburbs of Grand Rapids actively supported and partially financed this bill which would affect only Grand Rapids and one other city.[200] Although the question concerning an interdistrict remedy was mooted by the fact that Grand Rapids was not operating a segregated system, the court of appeals nevertheless determined that there was no constitutional violation in the passage of the senate bill.[201] The bill was justified on the grounds that surburban school districts would otherwise lose a substantial portion of their tax bases because most of the areas annexed were industrial, and the few children affected did not warrant such a loss.[202]

The propriety of the boundary problem created by Uni-Gov could also have been justified with a more specialized test for intent. A focus on *legislative* intent rather than segregative intent might have garnered sufficient governmental justification to overcome the

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[197]*See* Higgins v. Board of Educ., 395 F. Supp. 444 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).

[198]395 F. Supp. 444 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).

[199]395 F. Supp. at 473. Senate Bill 1100 was modified to become Act 177 of Public Acts of 1962 and is currently found at MICH. COMP. LAWS § 380.401 (Supp. 1980-81) where it differs in substance because of school reorganization.

[200]395 F. Supp. at 473.

[201]508 F.2d 779, 797 (6th Cir. 1974).

[202]395 F. Supp. at 474.

suspicion of an illicit discriminatory purpose.[203] Metropolitan reorganization has importance on its own merit without regard to its tangential effect upon schools.

The other anomaly in the Indianapolis case is the interdistrict effect attributed to housing. *Hills v. Gautreaux*,[204] a 1976 Supreme Court case, effectuated an interdistrict housing remedy for violations by the Chicago Housing Authority and the United States Department of Housing and Urban Development (HUD). The offense was entirely within Chicago's city limits, the only location where the two agencies had selected sites for public housing[205] although they had the power to operate within a three-mile radius from the city limits.[206] The Court determined in *Hills* that the district court had authority to force HUD to start selecting sites and assistance outside of Chicago, the power to do so already having been conferred by law.[207] Unlike the schools in *Milliken*,[208] there would be much less disturbance of local control because the agencies were not authorized to seek locations within other incorporated areas.[209] No relief was ordered for those people currently living at the discriminatorily selected sites, but then, unlike the Indianapolis case, the issue of school desegregation demanding immediate relief was not involved. With HACI's violations, it would have been simple to stop at a housing remedy which would have effectuated school desegregation sooner or later, and probably would have been less expensive for the school board.[210] This consideration, as well as the arguably legitimate state purpose for Uni-Gov, had to have created substantial problems in justifying an interdistrict desegregation order. At least one circuit court judge recognized this.

B. Dissension in the Indianapolis Case

When reading the 1980 Seventh Circuit opinion of *Indianapolis V*, one wonders whether the majority and the dissent are speaking of the same case. Circuit Judge Tone, whose research into the problem forced him to change his vote in *Indianapolis IV*,[211] wrote three

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[203]*See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 131.

[204]425 U.S. 284 (1976).

[205]*Id.* at 286.

[206]*Id.* at 298 n.14.

[207]*Id.* at 306.

[208]418 U.S. 717 (1974).

[209]425 U.S. at 298-99 n.14.

[210]Comment, *Housing Remedies in School Desegregation Cases: The View from Indianapolis*, 12 HARV. C.R.-C.L.L. REV. 649, 687 (1977).

[211]541 F.2d at 1224 n.* (Tone, J., dissenting).

strong dissents based specifically on the failure to demonstrate segregative purpose.[212] His most recent dissent disputes the majority's conclusion that the Uni-Gov act and HACI evinced the requisite intent for supporting an interdistrict remedy.

Judge Tone did not view the Uni-Gov act as fulfilling the *Arlington Heights* factors as they were used by the majority and the district court. He found no historical background of the act itself that showed segregative purpose.[213] He also concluded that past rejections of proposed consolidation in Marion County were warranted by financial reasons and the goal of local school district autonomy.[214] He completed his repudiation of Uni-Gov's role in the controversy by pointing out that the repeal of the statute, which had made school boundaries coterminous with civil annexation, was unnecessary because Uni-Gov was not an annexation by the city but rather a governmental reorganization imposed by the state.[215]

As for HACI, Judge Tone minimized its actual effect by explaining that its function in site selection was limited. Most of the locations were selected by a "turn-key" method, whereby a private developer selects the site and turns the project over to the housing authority after it is built.[216] The remaining sites were selected by a mayoral task force.[217] HACI's involvement was therefore *de minimus*. Judge Tone thus bemoaned the majority's reliance upon the disparate racial impact of a *de facto* situation, the only rationale he perceived as actually supporting the decision.[218]

C. The Indianapolis Case—A Result-Oriented Decision?

Indianapolis V was a case whose time had come. Nine years had been spent litigating essentially the same issue, the interdistrict remedy. As a newly applicable Supreme Court opinion was handed down, the case was returned to the district court. First, there was *Milliken v. Bradley*.[219] Then, there were *Arlington Heights*[220] and

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[212]*Id.* at 1224 (Tone, J., dissenting); 637 F.2d at 1119 (Tone, J., dissenting); 573 F.2d at 415 (Tone, J., dissenting). Judge Tone's dissent in *Indianapolis IV* warned the court of appeals of the deficiency in its decision because it did not include a finding of intent as prescribed by Washington v. Davis, 426 U.S. 229 (1976). He further denounced the majority's reliance upon a " 'racial impact' " theory. 541 F.2d at 1227 (Tone, J., dissenting).

[213]*Indianapolis V*, 637 F.2d at 1119-20 (Tone, J., dissenting).

[214]*Id.* at 1121 n.14. This is similar to the rationale accepted in the *Higgins* case. *See* text accompanying notes 198-202 *supra*.

[215]637 F.2d at 1122 (Tone, J., dissenting).

[216]*Id.* at 1125-26 (Tone, J., dissenting).

[217]*Id.* at 1126 (Tone, J., dissenting).

[218]*Id.* at 1129-30 (Tone, J., dissenting).

[219]418 U.S. 717 (1974).

[220]429 U.S. 252 (1977).

Washington v. Davis.[221] Actually, the most important decisions were *Columbus*[222] and *Dayton II*,[223] two cases which could have considerably eased the burden of finding segregative intent in Indianapolis if they had been decided sooner.

In the *Indianapolis V* decision, the district court and the court of appeals, to a certain degree, contorted a school desegregation case to fit into the molds of housing and employment decisions. The analyses from these kinds of cases are generally inapplicable in a school desegregation case, except that a finding of segregative intent is required and disparate racial impact alone is insufficient. In the Indianapolis case, the courts did an excellent, but at times unconvincing, job. The fault is not theirs; it lies with a lack of guidance. And yet, no blame can fairly be laid upon the Supreme Court either. School cases differ too much to afford a discernible pattern to their offenses and cures. Since *Brown I*, the Court has accepted various kinds of "segregative intent" and has drawn the line only when intent cannot be found at all.[224] That is why *Indianapolis IV* had to be remanded—no claim of segregative intent had been made. And that is why *Washington v. Davis* and *Arlington Heights* were suggested as the ruling authority—not because they instructed upon finding intent in the school context but because they simply required that segregative intent must be found to create a constitutional violation under equal protection.

There are two explanations of why *Indianapolis V* was not overturned. First, the litigation after *Indianapolis I* involved essentially a remedy case, as opposed to a violation case. Dual level litigation involving both violation and remedy stages is not atypical because

> [t]he school desegregation problem usually is divided into the violation and the remedy stages. In the first stage, the Court seeks to determine whether the school board or another state agency engaged in unconstitutional discrimination; the second prescribes the contours of the plan necessary to correct the violations. The difficulty in the first stage is in going . . . to the determination that the conduct was intentional or purposive discrimination.[225]

Different considerations are inherent in each phase. In the Indianapolis case, the initial violation stage was concluded with a find-

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[221]426 U.S. 229 (1976).

[222]443 U.S. 449 (1979).

[223]443 U.S. 526 (1979).

[224]No intent to support an interdistrict remedy was found in *Milliken*, 418 U.S. at 745.

[225]Lane, *The Principles and Politics of Equal Protection: Reflections on* Crawford v. Los Angeles City Board of Education, 10 SW. U.L. REV. 499, 521 n.107 (1978).

ing of de jure segregation in IPS in 1971. The ensuing nine years were spent vindicating the proposed remedy. Segregative intent still has to be found to justify an interdistrict remedy because the extent of any desegregation order must be justified by an equivalent violation.[226] But a brief survey of interdistrict cases has shown that once a de jure intradistrict system is discovered, very little further proof of intent is demanded. Thus, it appears that *Milliken*, in which an interdistrict remedy was denied, is the exceptional case rather than the rule.

It is also possible that *Indianapolis V* would have been just as acceptable even if it *had* been decided upon the racial impact theory denounced by Circuit Judge Tone. Indianapolis had a de jure segregated school system at the time of trial, and there had been an affirmative duty to dismantle it since 1954. If *Brown I* is considered a court-imposed mandate to desegregate a dual system, an analogy can be made to the Supreme Court's holding in *United States v. Scotland Neck City Board of Education*.[227] In that case, a legislature attempted to carve out a new school district in the face of a court order. " '[I]f a state-imposed limitation . . . operates to inhibit or obstruct . . . the disestablishing of a dual system, it must fall. ' "[228] HACI and Uni-Gov are those "state-imposed limitations" which prevented "the disestablishing of a dual system." The necessary intent, therefore, could have been established by this duty to desegregate IPS combined with the foreseeable consequences of disparate racial impact and interdistrict effect from Uni-Gov and HACI activities.[229] These factors would most likely have been sufficient indications of segregative intent for a Court which had just handed down *Columbus* and *Dayton II*.

VII. Conclusion

Unlike many commentaries on school desegregation cases, this one has a conclusion. There is no need to speculate as to what might happen in the next phase of litigation. Later issues arising in the Indianapolis case will not deal with the essential constitutional problem that took nine long years and almost a whole generation of school children to finish.[230] The case began with the IPS intradistrict

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[226]Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977).

[227]407 U.S. 484 (1972).

[228]*Id.* at 488 (quoting North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

[229]It must be remembered that the Court has denigrated the intent standard used to find HACI violations, the *Omaha* presumption. *See* note 142 *supra*.

[230]It will be interesting to note how the case in St. Louis will be decided in the wake of *Indianapolis V*. In the most recent St. Louis opinion, the court has required

violation, but the struggle centered around an interdistrict remedy for which no equivalent violation had initially been determined. At the conclusion of the lengthy litigation, the district court and the court of appeals justified the interdistrict relief by concluding that two governmental non-educational forces were motivated by segregative purposes. This finding fulfilled the Supreme Court's desideratum that only de jure, purposeful, segregation can be judicially corrected. The case therefore ended with a remedy for a violation.

The decision in the Indianapolis case will be difficult to follow because school cases make poor factual precedent. However, it is an excellent example of the effects of changing law and the individuality of each case. There probably will never be one definitive approach to finding segregative intent in school cases. Unlike housing and employment cases, school desegregation cases cannot be defined in terms of a single practice or decision.[231] The historical background, alleged violations, and school organization, among other factors, differ in school cases making them more difficult to judge than other kinds of equal protection litigation.

Another difference that sets school cases apart from other equal protection cases is their remedies. In school desegregation cases, the effects of the discrimination are continuously operating upon the children and cannot be cured as simply as other equal protection violations. In housing and employment cases, an injunction or a remedial order for the immediate plaintiffs can be instituted. But in school cases, the affected parties can only receive appropriate relief in some form of affirmative action, such as consolidation or busing.

The Indianapolis case also demonstrates another problem encountered in most northern school cases—absent overt discrimination, courts are compelled to infer intent in these cases. There are no guidelines for this procedure, which creates difficulties for the courts. The Indianapolis case shows the weakness in this kind of judicial treatment because a remand to the lower courts was required as each new pertinent decision was handed down.

But there is also strength in the flexibility inherent in this approach. Flexibility has allowed courts to look toward a result before a constitutional violation is actually found and to remedy segregative conditions that are more suggestive of de facto conditions than de jure. The continuing nature of school desegregation violations and the adverse consequences they can engender necessitate

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the joinder of outlying districts in order to determine whether an interdistrict remedy would be appropriate. Adams v. United States, 620 F.2d 1277, 1295-96 (8th Cir. 1980) *cert. denied*, 101 S. Ct. 88 (1980).

[231]Lane, *supra* note 225, at 521 n.107.

such strong action, perhaps upon less proof of discriminatory intent than in other cases. This is where the Indianapolis case fits. The litigation was result-oriented, an approach that the Supreme Court seems to have accepted without quarrel. If a court can find the slightest indicium of segregative intent or a former de jure system with a failure to affirmatively dismantle it, a desegregation order is not likely to be overturned absent an inequitable remedy.

SUSAN P. STUART

Use of Human Leukocyte Antigen Test Results to Establish Paternity

I. INTRODUCTION

The need for establishing paternity may be greater today than at any previous time. Numerous legal consequences in our society are dependant upon establishing a paternity relationship, and with the expansion of the welfare system and rapid growth of child support legislation on both state and federal levels,[1] paternity proceedings have become a substantial state concern. For example, paternity must be established in order for the illegitimate child to exercise his legal rights, duties, privileges, and obligations in relation to his putative father.[2] Proof of paternity is a crucial factor in determining whether the child can inherit by intestate succession from his natural father[3] or whether he can receive father-related welfare benefits.[4] Additionally, state initiated paternity suits charge

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[1]*See* Federal Social Security Act, Title IV-D, 42 U.S.C. §§ 651-60 (1976). Part D of Title IV of the Act requires states to establish or designate an agency to obtain and enforce orders for support of children for whom application to Aid to Families with Dependent Children has been made and, where necessary, to establish paternity in order to reduce the number of welfare recipients. *Id.*

[2]The illegitimate is entitled to fourteenth amendment equal protection in many substantive areas without first establishing paternity. Unacknowledged illegitmate children were accorded the right to recover for the wrongful death of their mother in Levy v. Louisiana, 391 U.S. 68 (1968), and they can inherit by intestate succession through their mother. *See* A—.B—. v. C—.D—., 150 Ind. App. 535, 277 N.E.2d 599 (1971); IND. CODE § 29-1-2-7 (1976). Illegitimates are also entitled to receive support through various federal, state, and local welfare programs. *See* Federal Social Security Act, Title IV-D, 42 U.S.C. §§ 651-660 (1976).

[3]Lalli v. Lalli, 439 U.S. 259 (1978) (the Court upheld the constitutionality of a statute which required an order of filiation within a specified period of time (in this case, two years after the child's birth) before the illegitimate was entitled to inherit by intestate succession from his natural father); Trimble v. Gordon, 430 U.S. 762 (1977) (the Court held that a statute which automatically disallows an illegitimate child's inheritance by intestate succession from his father violates the Equal Protection Clause of the fourteenth amendment). For Indiana case law applying *Lalli*, see Marsch v. Lill, 396 N.E.2d 695 (Ind. Ct. App. 1979) and Tekulve v. Turner, 391 N.E.2d 673 (Ind. Ct. App. 1979) (holding that IND. CODE § 29-1-2-7 (1976) which allows an illegitimate child to inherit from its natural father where paternity of the child has been established in a court of law during the father's lifetime, or where the putative father marries the mother *and* acknowledges the child to be his own, does not violate the Equal Protection Clause of the fourteenth amendment).

[4]Mathews v. Lucas, 427 U.S. 495 (1976) (the Court upheld the constitutionality of certain provisions of the Social Security Act which condition the eligibility of illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the child's parent and that the child was dependent on the

a father with the duty to financially support his child, thereby reducing the state's welfare obligation[5] and alleviating the burden on taxpayers.

The public interest in shifting the support obligation of an illegitimate from the state welfare department to the responsible father and the increasing number of substantive legal rights conferred on illegitimates are modern developments which mandate fundamental reform of the paternity action. In response to this need for reform, Indiana has taken affirmative steps toward the accurate and impartial identification of the father of an illegitimate child. The Indiana legislature recently amended its paternity statute[6] to facilitate compliance with the federal law which makes federal funds available to states that develop appropriate plans for establishing paternity and enforcing child support.[7] The statute now authorizes the state or county welfare departments to initiate paternity actions in cases where public assistance has been furnished for the benefit of the child.[8] In addition, Indiana is in the vanguard in liberalizing and revising its antiquated rules of evidence in paternity actions to reflect recent scientific advancements in the areas of blood grouping and tissue typing. Indiana Code section 31-6-6.1-8[9] was amended on

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parent for support); Jimenez v. Weinberger, 417 U.S. 628 (1974) (the Court held that Social Security Act § 416(h)(2)-(3), which entitles children of wage earner to his disability benefits, is unconstitutional because it arbitrarily discriminates between classes of illegitimates); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (dependent unacknowledged illegitimate children are on an equal footing with dependent legitimate children and are therefore entitled to recover benefits under Louisiana workmen's compensation laws for the death of their natural father). Although under *Jimenez* and *Weber* an illegitimate can recover despite the fact that paternity has not been legally established, nevertheless there must be a showing that the child is in a "direct blood and dependency relationship with the deceased" in order to avoid spurious claims. 406 U.S. at 175. The illegitimate still has to prove that the wage earner is his natural father in order to receive death or disability benefits through him. In both *Jimenez* and *Weber*, the children were at least informally acknowledged by the father and were totally dependent on the father for support.

[5]*See* Shaw & Kass, *Illegitimacy, Child Support, and Paternity Testing*, 13 HOUS. L. REV. 41 (1975); Krause, *Scientific Evidence and the Ascertainment of Paternity*, 5 FAM. L.Q. 252, 252-53 (1971).

[6]IND. CODE §§ 31-6-6.1-1 to -16 (Supp. 1980) (amended by Act of Feb. 27, 1980, Pub. L. No. 183, §§ 1-9, 1980 Ind. Acts 1595).

[7]Social Security Act, Title IV-D, 42 U.S.C. §§ 651-660 (1976 & Supp. III 1979).

[8]IND. CODE § 31-6-6.1-2 (b) (Supp. 1980).

[9]*Id.* § 31-6-6.1-8 (Supp. 1980), provides the following:

> Upon the motion of any party, the court shall order all of the parties to the action to undergo either a blood grouping test or a Human Leukocyte Antigen (HLA) tissue test. The tests shall be performed by a qualified expert approved by the court, *and the results of the tests may be received in evidence.*

Id. (emphasis added).

February 27, 1980,[10] to allow the results of a human leukocyte antigen (HLA) tissue typing test to be received into evidence.[11] This test is more sophisticated than its predecessors and permits a more

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[10]Act of Feb. 27, 1980, Pub. L. No. 183, § 1-9, 1980 Ind. Acts 1595.

[11]The principles of genetics and blood chemistry which form the basis for the paternity tests are beyond the scope of this Note. For a detailed scientific analysis of these tests, see Abbott, Sell & Krause, *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976) [hereinafter cited as the *AMA-ABA Guidelines*]; Lee, *Current Status of Paternity Testing*, 9 FAM. L.Q. 615 (1975); Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978).

A short description of the HLA Antigen Blood Grouping Test is, however, necessary so that the reader may more fully understand its far-reaching implications on the ascertainment of paternity. The HLA test is a new method which is based on the identification and typing of antigen markers found in white blood cells and other tissues of the body. Carlyon v. Weeks, 387 So. 2d 465, 466 (Fla. Dist. Ct. App. 1980).

> It is essentially a tissue-typing test which can be performed on, for example, lymph or spleen tissues as well as white blood cells. The HLA test was developed and used primarily in organ transplantat[ion] for purposes of determining if organs from a donor would be accepted or rejected by the possible recipient.

Id. See also S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS, § 8.08 (4th rev. ed. 1980).

The HLA testing procedure is similar to the red blood cell typing procedure used for the ABO blood group system. Carlyon v. Weeks, 387 So. 2d at 466. However, the results of the ABO system render only a 50% to 60% chance that a particular man is the father. Cramer v. Morrison, 88 Cal. App. 3d 873, 878, 153 Cal. Rptr. 865, 867 (1979). The HLA system is a more sophisticated procedure which involves a larger number of antigen markers in the white blood cells. *Id.* The basic theory is that by identifying the antigen markers of a child and of the mother, the child's antigen genetic markers which could only be inherited from the father can be determined. Terasaki, *supra*, at 548-49. The advantage of the HLA test is that, due to the large number of antigen markers (as many as sixty-two) which have been identified, it may disclose rare antigens on the cells of two people which they probably have in common because of genetic inheritance rather than through mere chance. The HLA test thus permits identification of the father with a higher degree of certainty than was possible by the ABO red blood grouping. *Id.* at 543-44, 548-49, 554-55. Most people are "rare" types in the sense that only about one out of a thousand people have a similar HLA type. *Id.* at 544. Therefore, a "rare" type that occurs in a putative father and that also occurs in a child produces a high degree of probability (between 95% and 99%) that the putative father is, in fact, the father. *Id.* "On the other hand, if the putative father is wrongly accused, he can usually be excluded because the child would have inherited a different rare type from the actual father." *Id.*

Because of this remarkable advance in the number and accuracy of paternity tests, the probability of determining whether the accused man is actually the father is greatly increased. Probability estimates are based on the frequencies of genetic markers in the general population; the investigator compares the "frequency of a given father-mother-child constellation in a sample of the alleged actual father's blood with the constellation in a sample of blood from a random man." Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 11 (1974). However, although these paternity tests can conclusively establish exclusion, they can never establish the likelihood of paternity with absolute certainty. Krause, *supra* note 5, at 261.

precise typing of a father and child's blood.[12] As the requisite blood type becomes more defined, a higher percentage of men are excluded from being the father of the child in question, thereby narrowing the group of potential fathers.[13] Consequently, proof of parentage is more conclusive.[14] The 1980 amendment is all the more important because it does not specify whether these new tests are admissible to establish paternity rather than merely to exclude the probability of paternity.[15] Thus, the way is open for the introduction into evidence of the results of these tests to show the likelihood that the named man is the actual father.

Despite the obvious probative and evidentiary value of these medical techniques on the issue of paternity, there are several drawbacks in introducing such highly complex scientific evidence into the trial process. This Note will concentrate on balancing the probative value of these advancements against the prejudicial effect they may have on the accuracy and fairness of the fact-finding process. First, however, a review of Indiana and national legislation concerning the use of blood group evidence in paternity trials will be presented.

II. HISTORICAL BACKGROUND

A. Comparison of Indiana Code Section 31-6-6.1-8 to its Predecessor Statutes

1. The 1953 Statute.—Historically, Indiana paternity statutes have reflected scientific trends in blood grouping and tissue testing. In 1953, the Indiana Legislature enacted a statute which allowed blood tests to be received into evidence only to show that the accused man could not be the father.[16] The three standard blood tests used at this time were based on red blood cell groupings,[17] and when used together, they enabled a falsely accused man to exclude himself from

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[12]Krause, *supra* note 5, at 261.

[13]*Id.*

[14]*Id.*

[15]*See* IND. CODE § 31-6-6.1-8 (Supp. 1980).

[16]Act of Mar. 13, 1953, Ch. 161, 1953 Ind. Acts 575 (codified at IND. CODE § 34-3-3-1 (1976) (repealed by Act of March 10, 1978, Pub. L. No. 136, § 57, 1980 Ind. Acts 1196)). The tests were used only "to determine whether or not the defendant [could] be excluded as being the father of the child, and the results of such tests [might] be received in evidence, but only in cases where definite exclusion [was] established." IND. CODE § 34-3-3-3 (1976) (repealed by Act of March 10, 1978, Pub. L. No. 136, § 57, 1980 Ind. Acts 1196).

[17]C. MCCORMICK, THE LAW OF EVIDENCE, § 211 at 517-23 (2d ed. 1972). The red blood cell groupings were the ABO, MN, and Rh-Hr. *Id.*

fatherhood about fifty-one percent of the time.[18] The courts successfully merged this medical knowledge into the legal sphere; blood tests were admissible into evidence to establish conclusive proof of nonpaternity.[19] In *Beck v. Beck*,[20] the Indiana Court of Appeals said:

> "If the negative fact [of paternity] is established [scientifically] it is evident that there is a great miscarriage of justice to permit juries to hold on the basis of oral testimony, passion or sympathy, that the person charged is the father and is responsible for the support of the child and other incidents of paternity."
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> . . . .
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> When medical science has perfected certain tests to the point where it can be said with almost medical certainty that something is a fact, the court should not hide in the dark ages and be bound by archaic rules which subvert the truth and impede the sound administration of justice.[21]

The *Beck* court clearly accepted the validity and accuracy of the blood tests. However, although the test results were conclusive in excluding a falsely accused man as the father, they were inconclusive in establishing that a particular male was actually the father.[22]

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[18]*Id.* at 519.

[19]*See, e.g.*, Beck v. Beck, 159 Ind. App. 20, 304 N.E.2d 541 (1973). The court in *Beck* held that admissibility of blood group test results to establish nonpaternity is conditioned upon a showing that the results of the test exclude paternity. *See also* L.F.R. v. R.A.R., 370 N.E.2d 936 (Ind. Ct. App. 1977), *vacated*, 378 N.E.2d 855 (Ind. 1978); A—.B—. v. C—.D—., 150 Ind. App. 535, 277 N.E.2d 599 (1971) (the court held that medical evidence showing nonpaternity could not rebut the persumption of legitimacy absent a showing that the tests involved were accurate. *Id.* at 564, 277 N.E.2d at 619).

[20]159 Ind. App. 20, 304 N.E.2d 541 (1973).

[21]*Id.* at 26, 304 N.E.2d at 545 (quoting the prefatory note to the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY, 9 U.L.A. 102 (1957)). The *Beck* court, in holding that the blood tests should conclusively establish nonpaternity, remedied the unjustness inherent in allowing the trier of fact to rule for the plaintiff in a paternity action where the blood tests showed the impossibility of the defendant being the father of the child. *See* Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937) & Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946) (juries were permitted to find men to be the fathers despite medical evidence to the contrary).

[22]159 Ind. App. at 24-25, 304 N.E.2d at 544. Probable reasons for this result are the inconclusiveness of only 50% to 60% probability of paternity establishable under the existing blood tests, *see* Cramer v. Morrison, 88 Cal. App. 3d 873, 878, 153 Cal. Rptr. 865, 867 (1979), and the possibility that the jury might misinterpret and give undue weight to these statistics. *See* C. MCCORMICK, *supra* note 17, § 211 at 522. For these reasons courts determine that the prejudice would greatly outweigh the probative value of such evidence. *See id.*

2. The 1979 Revision.—After Indiana Code section 34-3-3-1 was repealed in 1978,[23] the Indiana Legislature in 1979 enacted Public Law Number 277 which states: "Upon the motion of any party, the court shall order all of the parties to the action to undergo either a blood grouping test or a Human Leukocyte Antigen (HLA) tissue test. The tests shall be performed by a qualified expert approved by the court."[24] The legislature, while apparently recognizing the value and reliability of HLA tests in establishing paternity, failed to mention the evidentiary value of such tests. Therefore, it was unclear whether the tests were to be used to establish paternity as well as nonpaternity. Moreover, the legislature was silent with respect to integration of these scientific breakthroughs into the fact-finding process, especially in view of the usual time lag between scientific discovery and legal recognition.[25]

3. The 1980 Amendment.—The legislature in 1980 amended Indiana Code section 31-6-6.1-8 to liberalize the admissibility of HLA test results.[26] The statute now reads in pertinent part: "[T]he results of the tests *may* be received in evidence."[27] The amendment is again, however, highly ambiguous. It neither specifies whether the tests are to be used to demonstrate paternity in addition to nonpaternity, nor does it specify the weight to be accorded such evidence. Although progressive in adapting medical advancements in the area of paternity testing to rules of evidence, the Indiana legislature left the judiciary the task of insuring that this scientific evidence is fairly and efficiently applied in the paternity proceeding. It left significant discretion to the courts in various matters, such as (1) demonstration that these new tests are reliable and have received general acceptance in the scientific community;[28] (2) evaluation of whether the evidence is of sufficient probative value on the issue of paternity to outweigh the possible danger of its misuse; (3) determination of the proper function of scientific evidence at trial;[29] and (4) ad-

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[23]IND. CODE § 34-3-3-1 (1976) (repealed by Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196).

[24]Act of Apr. 10, 1979, Pub. L. No. 277, § 1, 1979 Ind. Acts 1446 (currently codified at IND. CODE § 31-6-6.1-8 (Supp. 1980)).

[25]*See* Shaw & Kass, *supra* note 5, at 51.

[26]Act of Feb. 27, 1980, Pub. L. No. 183, § 5, 1980 Ind. Acts 1595 (amending IND. CODE § 31-6-6.1-8 (1979)).

[27]IND. CODE § 31-6-6.1-8 (1980) (emphasis added).

[28]*See, e.g.*, A—.B—. v. C—.D—., 150 Ind. App. 535, 564-65, 277 N.E.2d 599, 619 (1971). The court in this case held that, before blood tests can conclusively establish nonpaternity, the accuracy of the particular test method must first be demonstrated. This principle will be more fully developed in the subsequent discussion.

[29]Professor Jaffee, for example, advocates that scientific proof should be severely limited at trial. Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results*

ministration of proper jury instructions in order to assure the correct interpretation and application of the blood and tissue test results in conjunction with other circumstantial evidence conventionally used in paternity trials.[30]

B. Section 31-6-6.1-8 Compared with the Uniform Acts on Paternity

Compared with other jurisdictions, Indiana is remarkably progressive in revising its rules of evidence in paternity proceedings to conform with modern medical advancements in the area of paternity testing. Arguably, the ambiguity of the 1980 amendment to section 31-6-6.1-8 allows for utilization of blood and tissue test results as evidence to indicate paternity probability; if so, this would be a significant departure from prior Indiana practice.

Various Uniform Acts provide for the admission of blood test results as relevant evidence in the determination of paternity.[31] Occassionally, these Acts give greater weight to the results of blood tests than have the courts.[32] Section four of the Uniform Act on Blood Tests to Determine Paternity[33] makes test results conclusive

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and Other Statistical Evidence: A Response to Terasaki, 17 J. FAM. L. 457 (1979). Jaffee feels that HLA test results estimating probability of paternity are legally inappropriate as "independent, main-case, direct examination evidence on an ultimate issue of paternity." *Id.* at 484. They would be performing a legitimate function at trial, however, "where they appear merely as part of the basis of an otherwise admissible expert opinion, where they are directed merely at issues of secondary, basic fact, or, in any event, where they function merely as impeachment, contradiction, or rehabilitation or secondary corroboration." *Id.* at 476.

[30]Examples of other such evidence include: (1) evidence of sexual intercourse between the mother and alleged father during the possible conception period; (2) an expert's opinion concerning the probability of the alleged father's paternity based upon the duration of the mother's pregnancy; and (3) the practice of comparing the child's resemblance to that of the putative father. *See* UNIFORM PARENTAGE ACT § 12; Krause, *supra* note 2, at 272.

[31]*E.g.*, UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY §§ 1-2,4; UNIFORM ACT ON PATERNITY §§ 7-8,10; UNIFORM PARENTAGE ACT § 12.

[32]*See* UNIFORM ACT ON BLOOD TESTS TO DETERMINE PARTERNITY §§ 7-8,10; UNIFORM PARENTAGE ACT § 12. Test results for the purpose of showing nonpaternity are now widely received in evidence. *See, e.g.*, Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940); Beck v. Beck, 159 Ind. App. 20, 304 N.E.2d 514 (1973); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950); C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. Ct. 1951); State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (Fayette County Ct. Quarter Sess., 1931). Few jurisdictions have, however, allowed test results in for the purpose of showing the likelihood of paternity. *See, e.g.*, Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Carlyon v. Weeks, 387 So. 2d 465 (Fla. Dist. Ct. App. 1980); Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979).

[33]UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY § 4. This legislation, drafted in response to the unscientific decisions in Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937) and Barry v. Chaplain, 74 Cal. App. 2d 652, 769 P.2d 442 (1946),

on nonpaternity and opens the door for the affirmative use of blood test evidence to estimate parentage. The Commissioners' Prefatory Note[34] explains that the Act was drawn not only to insure that accurate test results establishing exclusion be entitled to conclusive weight but also to permit admissibility in the court's discretion of evidence tending to prove paternity. Section four concludes, "If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type."[35] By conditioning the admissibility of probability statements "on the infrequency of the blood type,"[36] the Act integrates advancements of science into the legal process.[37]

A minority of states have adopted either the Uniform Act on Blood Tests to Determine Paternity[38] or the Uniform Act on Paternity.[39] A third act, the Uniform Parentage Act, has also been adopted in a minority of jurisdictions.[40] This Act provides for more liberal admissibility of medical evidence:

> Evidence relating to paternity may include:
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> . . .
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> (3) blood test results, weighted in accordance with evidence,

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sets out procedures for ordering the tests, selecting experts, and giving effect to the test results.

[34]9 U.L.A. 102, 103-04 (1957).

[35]UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY § 4.

[36]*Id.*

[37]As discussed in note 11 *supra*, new blood typing systems and identification of increasing numbers of antigen markers increase the rarity of a particular blood group combination.

[38]*See* 9A U.L.A. 102, 102 (1957) (prefatory note). The following are among the enacted versions of the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY: CAL. EVID. CODE §§ 890-897 (West 1966) (omitting last sentence of Section 4); N.H. REV. STAT. ANN. §§ 522:1-10 (1955); OKLA. STAT. ANN. tit. 10, §§ 501-508 (West Supp. 1980); UTAH CODE ANN. §§ 78-45a-7 to -17 (1977).

[39]*See* 9A U.L.A. 623, 623 (1979) (prefatory note). The following are enacted versions of the UNIFORM ACT ON PATERNITY: KY. REV. STAT. §§ 406.011-.180 (1972 & Supp. 1980); ME. REV. STAT. ANN. tit. 19, §§ 271-287 (1981); MISS. CODE ANN. §§ 93-9-1 to -75 (1972); N.H. REV.STAT. ANN. §§ 168-A:1 to A:12 (1955) (omitting section 10); UTAH CODE ANN. §§ 78-45a-1 to -17 (1977). Sections 7-10 of the UNIFORM ACT ON PATERNITY were taken, with minimal adjustments, from the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY §§ 1-4. 9A U.L.A. 623, 634 (1979).

[40]*See* 9A U.L.A. 579, 579 (1979) (prefatory note). The following are enacted versions of the UNIFORM PARENTAGE ACT: CAL. CIVIL CODE §§ 7000-7021 (West Supp. 1981); COLO. REV. STAT. §§ 19-6-101 to -129 (1973); HAW. REV. STAT. §§ 584-1 to -26 (1976); MONT. REV. CODES ANN. §§ 61-301 to -334 (Supp. 1977); N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1977); WASH. REV. CODE §§ 26.26.010 to .905 (Supp. 1980); WYO. STAT. §§ 14-2-101 to -120 (1978).

> if available, of the statistical probability of the alleged father's paternity;
> (4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. . . . ; and
> (5) all other evidence relevant to the issue of paternity of the child.[41]

Although the use of statistics bearing on the probability of paternity is allowed in the Uniform Act on Parentage and arguably is allowed in the court's discretion under the Uniform Act on Paternity and the Uniform Act on Blood Tests to Determine Paternity, the Joint AMA-ABA Guidelines[42] recommend that these statistics be even more readily admitted. The Guidelines recommend:

> that the National Conference of Commissioners on Uniform State Laws develop new uniform legislation or amend the "Uniform Parentage Act" and the "Uniform Blood Test Act" to . . . simplify the admissibility in evidence of test results and the probative effect thereof, including the evidentiary value of estimations of "likelihood of paternity."[43]

By failing to specify the probative value to be given to these blood test results, the Indiana and Uniform Acts are equally hesitant in utilizing statistics to estimate the likelihood of paternity, as opposed to nonpaternity. As a result, courts must fashion standards for admission of blood test results into evidence for this purpose.

III. General Requirements for Admission of Evidence

A. Logical and Legal Relevancy

Admission of evidence necessarily requires a balancing of the conflicting requirements of logical and legal relevancy,[44] or in other words, the weighing of the probative value of such evidence and the dangers inherent in its application.

1. Logical Relevancy.—All evidence must meet a minimum standard of relevancy of probative quality in order to be admitted.[45] Evidence is "relevant" if, in the light of general experience, it logically tends to prove or disprove some issue or fact material to

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[41]Uniform Parentage Act § 12.

[42]*AMA-ABA Guidelines, supra* note 11.

[43]*Id.* at 283.

[44]For a thorough discussion of logical and legal relevancy, see C. McCormick, *supra* note 17, §§ 184-185.

[45]*Id.* § 184.

the controversy.[46] The general standard for the admissibility of evidence as relevant is that "it makes the sought-for inference more probable than it would be without the evidence. Accordingly, evidence may be found relevant although its ability to persuade is extremely light."[47]

Those advocating the use of HLA test results to prove probability of paternity draw their arguments from the premise of "logical relevancy."[48] The test results are used as circumstantial evidence to prove the fact of paternity, and because HLA tests are highly accurate in establishing paternity, the results of the test are clearly probative and therefore logically relevant in an action to establish paternity. Proponents argue that admissibility of scientific evidence advances the accuracy and fairness of the fact-finding process because the evidence assists the trier of fact in resolving the issue of paternity with more precision than would some of the more conventional evidence,[49] such as whether the putative father had access to the mother during the period of conception.[50]

2. Legal Relevancy.—Although HLA tissue typing results are highly probative relevant evidence and therefore prima facie admissible, a trial judge may use his discretion to reject this evidence if there are counterbalancing factors outweighing its probative value.[51] The process of excluding probative evidence because of certain risks inherent in its application is known as "legal relevancy."[52] Counterbalancing factors which may outweigh the probative value of the evidence include:

> First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering

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[46]*Id.* § 185. Several recent Indiana courts have defined relevancy as the "logical tendency of evidence to prove a material fact." Lake County Council v. Arrendondo, 266 Ind. 318, 321, 363 N.E.2d 218, 220 (1977); Indiana Nat'l Corp. v. FACO, Inc., 400 N.E.2d 202, 206 (Ind. Ct. App. 1980); Hedges v. Public Serv. Co., 396 N.E.2d 933, 937 (Ind. Ct. App. 1979).

[47]Smith v. Crouse-Hinds Co., 373 N.E.2d 923, 926 (Ind. Ct. App. 1978), *transfer denied*, 392 N.E.2d 1168 (Ind. 1979).

[48]*See, e.g.*, S. SCHATKIN, *supra* note 11, at §§ 8.06-.14; *AMA-ABA Guidelines*, *supra* note 11; Chakrabortz, Shaw & Schull, *Exclusion of Paternity: The Current State of the Art*, 26 AM. J. OF HUMAN GENETICS 477 (1974); Krause, *supra* note 5; Lee, *supra* note 11; Salisbury, *The Use of Blood Test Evidence in Paternity Suits: A Scientific and Legal Analysis*, 30 FACULTY L. REV. 47 (1972); Shaw & Kass, *supra* note 5.

[49]*See* authorities cited in note 48 *supra*.

[50]*See, e.g.*, Collins v. Wise, 156 Ind. App. 424, 296 N.E.2d 887 (1973); Kintz v. State, 71 Ind. App. 225, 124 N.E. 739 (1919); Gemmill v. State, 16 Ind. App. 154, 43 N.E. 909 (1896).

[51]Smith v. Crouse-Hinds Co., 373 N.E.2d 923, 926 (Ind. Ct. App. 1978).

[52]*See* C. MCCORMICK, *supra* note 17, § 185 at 440-41.

> evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.[53]

A fifth counterbalancing factor which opponents of nonexclusionary HLA results propose is the danger that the evidence will confuse or mislead the jury.[54] These objections are inherent in the use of scientific evidence at trial.[55] Because of the technical nature of the evidence and the degree of certainty and infallibility suggested by scientific data in general, there is a danger that the jury may attach exaggerated significance to the test results.[56] Instead of using the data to corroborate the nonscientific proof of paternity, the jury could be so influenced by the scientific data that it would ignore more conventional evidence. With HLA test results, statistics would no doubt show a very high degree of probability, and the jury might consider that they alone would suffice to meet the "preponderance of the evidence" standard which is required in paternity actions.[57]

B. General Admissibility of New Scientific Evidence

Evaluation of the propriety of admitting nonexclusionary test results is closely linked to factors involved in accepting any new scientific technique or discovery as evidence. Because of the "misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature,"[58] courts have

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[53]*Id.* at 439-40. *Accord*, Smith v. Crouse-Hinds Co., 373 N.E.2d at 926 (listing the identical factors).

[54]Smith v. Crouse-Hinds Co., 373 N.E.2d at 926. *See also* State v. Ingram, 399 N.E.2d 808 (Ind. Ct. App. 1980); Walters v. Kellam & Foley, 172 Ind. App. 207, 360 N.E.2d 199 (1977).

[55]*See* C. McCORMICK, *supra* note 17, § 202.

[56]*See* United States v. Baller, 519 F.2d 463, 465 (4th Cir. 1975); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974); People v. Kelly, 17 Cal. 3d 24, 31-32, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976); Huntingdon v. Crowley, 64 Cal. 2d 647, 656, 414 P.2d 382, 390, 51 Cal. Rptr. 254, 262 (1966).

[57]Collins v. Wise, 156 Ind. App. at 426, 296 N.E.2d at 889; Cohen v. Burns, 149 Ind. App. 604, 606, 274 N.E.2d 283, 284 (1971). *See* Ellman & Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U.L. REV. 1131, 1159 (1979).

[58]Huntingdon v. Crowley, 64 Cal. 2d at 656, 414 P.2d at 390, 51 Cal. Rptr. at 262 (1966). *See also* People v. Kelly, 17 Cal. 3d at 31, 549 P.2d at 1245, 130 Cal. Rptr. at 149, in which the court warned that admission of evidence based on new scientific principles warrants thorough judicial consideration: "Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to

deliberately and cautiously retarded the admission of evidence born of new techniques until the "scientific community has had ample opportunity to study, evaluate and accept its reliability."[59] Hence, there is generally a considerable lag between scientific advances and their acceptance as evidence in a legal proceeding.[60]

1. Acceptance by the Relevant Scientific Community.—The most crucial factor in the decision to admit new scientific evidence is whether it has been "sufficiently established to have gained general acceptance in the particular field in which it belongs" as required by the landmark case of *Frye v. United States*.[61] Several other courts have accepted the *Frye* test in determining the underlying reliability of a new scientific technique.[62] The *Frye* test requires that when faced with a novel method of proof, expert testimony is usually required to establish the validity of the technique and its general acceptance in the relevant scientific community.[63] Not only must the

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give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials."

[59]People v. Kelly, 17 Cal. 3d at 41, 549 P.2d at 1251, 130 Cal. Rptr. at 155 (citation omitted). The *Kelly* court explained this proposition further:

> Ideally, resolution of the general acceptance issue would require consideration of the views of a typical cross-section of the scientific community, including representatives, if there are such, of those who oppose or question the new technique.
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> . . . .
>
> . . . [T]rial courts should take affirmative steps to assure that an accurate description of the [relevant] scientific community is present before the court. . . . "The court should then make an effort to ascertain the extent of any opposition so identified . . . ."

Id. at 37, 549 P.2d at 1248-49, 130 Cal. Rptr. at 152-53 (quoting Comment, *The Voiceprint Dilemma: Should Voices be Seen and not Heard?*, 35 MD. L. REV. 267, 293 (1975)). *See also* Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 16-17.

[60]People v. Kelly, 17 Cal. 3d at 31-32, 549 P.2d at 1245, 130 Cal. Rptr. at 149; People v. Spigno, 156 Cal. App. 2d 279, 289, 319 P.2d 458, 464 (1957).

[61]293 F. 1013, 1014 (D.C. Cir. 1923) (dealing with acceptance of lie-detector tests as scientific evidence). *See* Phillips v. Jackson, 615 P.2d 1228, 1233 (Utah 1980) (characterising the *Frye* test as the "most widely used standard").

[62]*See, e.g.*, United States v. Baller, 519 F.2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975) (dealing with voice spectrogram analysis to identify a speaker); United States v. Stifel, 433 F.2d 463 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (dealing with neutron activation analysis of bomb package fragments); People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (dealing with use of spectrograms to analyze voice prints); People v. Williams, 164 Cal. App. 2d 858, 331 P.2d 251 (1958) (dealing with use of Nalline tests to detect the presence of narcotics in a person's body).

[63]*See, e.g.*, United States v. Baller, 519 F.2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975). A less rigorous evidentiary foundation was required in McKay v. State, 155 Tex. Crim. 416, 235 S.W.2d 173 (1951) (lack of unanimity of support goes only to the weight of the evidence).

expert witness be properly qualified to give an opinion on the subject,[64] but he must establish that some scientific profession "has put the principle to some use of its own, thus affording a thorough empirical testing of the principle."[65] The principle must have gained acceptance as a working tool in the particular field which experimented with it.[66] "The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice."[67] Additionally, the *Frye* requirement assures the existence of a minimal reserve of experts who can critically evaluate the novel technique as applied in a particular case, expose the limitations of the new theory, and impartially assess the position of the scientific community.[68]

2. Validity and Reliability of the Test Results.—An adequate foundation for the tests is crucial to prevent deception and misapplication of the theory; however, several courts have argued that any criticism of the developments should go to the *weight* of the evidence and not to its admissibility.[69] The court in *United States v. Stifel*[70] said that absolute certainty of result or unanimity of scientific opinion is not required for admissibility:

> [N]either newness nor lack of absolute certainty in a test suf-

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[64]*See*, United States v. Stifel, 433 F.2d at 438; People v. Kelly, 17 Cal. 3d at 30-31, 549 P.2d at 1244, 130 Cal. Rptr. at 148; Jones, *Danger—Voiceprints Ahead*, 11 AM. CRIM. L. REV. 549, 554 (1973); Strong, *supra* note 59, at 16. The expert's qualifications need to be established; furthermore, he must testify only as to areas within his demonstrated competence. *Id.* at 9-10. A sufficient foundation must also be laid concerning the application "of a scientific method, test, or process on a *particular occasion.*" *Id.* at 20 (emphasis added). The proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. *Id.* at 18-22. In United States v. Baller, 519 F.2d at 467, the court upheld a jury instruction warning the jurors to disregard the expert's testimony "if they decided his opinion was not based on adequate education or experience." *But see*, People v. Williams, 164 Cal. App. 2d at 860-62, 331 P.2d at 253-54 (the court stated that despite the fact that the expert witness had no personal knowledge of the drug used, the drug's general acceptance in the community overcame this problem).

[65]Strong, *supra* note 59, at 12. *See also* People v. Kelly, 17 Cal. 3d at 30-31, 549 P.2d at 1244, 130 Cal. Rptr. at 148; Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

[66]Strong, *supra* note 59, at 12.

[67]United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974).

[68]*Id.*; United States v. Baller, 519 F.2d at 465; People v. Kelly, 17 Cal. 3d at 30-32, 37-38, 549 P.2d at 1244-45, 1248-49, 130 Cal. Rptr. at 148-49, 152-53.

[69]United States v. Franks, 511 F.2d 25, 33-34 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); United States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); McKay v. State, 155 Tex. Crim. 416, 235 S.W.2d 173 (1951).

[70]433 F.2d 431, 438 (6th Cir. 1970), *cert. denied*, 401 U.S. 944 (1971).

> fices to render it inadmissible in court. Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers and accountants, to name just a few of the legions of expert witnesses.[71]

Therefore, those opposing the admissibility of scientific tests can direct their criticism toward the weight given to such evidence. Although the trial judge initially has a large measure of discretion in admitting or refusing to admit evidence based on scientific processes, the jury must weigh the credibility of the expert's testimony after full consideration of its value and imperfections.[72] Indiana case law also supports admission of relevant evidence without regard to its weight or sufficiency.[73] In dealing with the admissibility of expert testimony the Fourth Circuit Court of Appeals in *United States v. Baller*[74] stated:

> In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts.
>
> . . . .
>
> Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.[75]

Scientific evidence is particularly useful as a fact-finding tool if a proper evidentiary foundation has been laid; it is equally important, especially where mathematical probability or statistics are used, to ensure that data concerning the frequency of occurrence of certain events can be "subsequently and independently empirically verified."[76] This requirement of subsequent independent verification for the purpose of "either duplicat[ing] the result or criticiz[ing] the

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[71]*Id. Accord*, State v. Johnson, 42 N.J. 146, 171, 199 A.2d 809, 823 (1964); Strong, *supra* note 59, at 11.

[72]*See* note 69 *supra*.

[73]*See* Harbor v. Morgan, 4 Ind. 158 (1853).

[74]519 F.2d 463, 465 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

[75]*Id.* at 466.

[76]Liddle, *Mathematical and Statistical Probability As a Test of Circumstantial Evidence*, 19 CASE W. RES. L. REV. 254, 276 (1968).

means by which it was reached"[77] is also a guarantee that correct scientific procedures were used in the particular case.[78] Therefore, in order to meet the requirements of admissibility, the expert testimony must establish that the newly developed scientific process is founded on tangible demonstrative premises; such evidence must not be accepted unless there is an assurance that the tests have been conducted in accordance with the highest standards of care.

C. Admission of HLA Test Results as New Scientific Evidence

The revolution in paternity testing brought about by advancements in HLA tissue typing has induced the writing of various scientific and legal articles on the subject. Several of these authorities, in advocating the use of the test results as evidence of positive proof of paternity, have demonstrated the conformity of the HLA test methods with principles concerning admissibility of new scientific techniques.[79]

1. Acceptance of HLA Testing by the Scientific Community.—Support for the view that the scientific community has accepted HLA test results as a reliable predictor of paternity can be found from a number of sources. An overview of various scientific and legal articles illustrates the general awareness of and acceptance by the relevant scientific community of HLA testing as a reliable predictor of paternity.[80] The substantial weight of medical and legal authority attests to their accuracy and value.[81] In addition, a number of courts have already found that HLA results satisfy the *Frye* test.[82] This requirement is also demonstrated by the widespread use of HLA testing in areas of medical science other than paternity testing, namely in kidney or other organ transplants and in the diagnosis of certain diseases.[83]

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[77]United States v. Baller, 519 F.2d at 466.

[78]*See* note 64 *supra*.

[79]*See, e.g.*, S. SCHATKIN, *supra* note 11, §§ 8.06-.14; *AMA-ABA Guidelines*, *supra* note 11; Chakrabortz, Shaw & Schull, *supra* note 48; Ellman & Kaye, *supra* note 57; Krause, *supra* note 5; Lee, *supra* note 11; Salisbury, *supra* note 48; Shaw & Kass, *supra* note 5; Sterlek & Jacobson, *Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough*, 20 SANTA CLARA L. REV. 511 (1980); Terasaki, *supra* note 11.

[80]*See* note 79 *supra*.

[81]*Id.*

[82]*See e.g.*, County of Fresno v. Superior Court, 92 Cal. App. 3d 133, 136-38, 154 Cal. Rptr. 660, 662-63 (1979); Cramer v. Morrison, 88 Cal. App. 2d 873, 153 Cal. Rptr. 865 (1979); Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979).

[83]*AMA-ABA Guidelines*, *supra* note 11, at 272-76. The HLA test has gained widespread acceptance for use in kidney transplants in the United States and Europe. Cramer v. Morrison, 88 Cal. App. 3d 873, 878, 153 Cal. Rptr. 865, 867 (1979); Terasaki

Finally, the widespread acceptance of serologic data in the estimation of likelihood of paternity is further documented by the European practice of admitting blood group evidence showing the probability that a named man is the father of a given child.[84] European laboratories have developed complex blood typing systems as well as safety procedures which assure accuracy of their results. The test results are reported to the court only if the probability is significantly high, above ninety-five percent, or significantly low, less than five percent.[85] Therefore, at the outer limits, this approach produces de facto inclusions or exclusions.[86] At the very least, it produces valuable circumstantial evidence. There is a general consensus among authorities[87] throughout the United States and Europe that HLA tissue typing is an accurate indicator of paternity exclusion and a reliable predictor of paternity inclusion. Thus, HLA typing has met one of the requirements for the admissibility of new scientific evidence—it is a practical working tool in a scientific field.

2. *Validity and Reliability of HLA Test Results.*—Likelihood of paternity must be calculated using probability factors. In HLA tissue typing, calculations of the probability that a mating of the known mother and a particular nonexcluded putative father would produce a child with the genetic markers in question are based on gene frequencies in a given population.[88] "Probabilities are assigned to the various possible genotypes using population statistics and then all possible combinations are considered in the calculation."[89] Ordinarily, the nonexcluded putative father is compared to a random man.[90] The probability that a mating of the mother with a randomly chosen man would produce a child with the genetic markers in question can also be calculated from the frequency of the markers in the

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& Mickey, *Histocompatibility—Transplant Correlation, Reproducibility, and New Matching Methods*, 3 TRANSPLANTATION PROC. 1057 (1971). "Progress in HLA typing is very rapid, principally because of the clinical importance of HLA. Survival of transplanted organs depends to a large extent on HLA compatability between the donor and recipient, . . . so there is great pressure to improve the efficacy [of] HLA typing." S. SCHATKIN, *supra* note 11, § 8.08 at 8-23.

[84]*AMA-ABA Guidelines*, *supra* note 11, at 252, 260-63; Chakrabortz, Shaw & Schull, *supra* note 48, at 477; Lee, *supra* note 11, at 616; Terasaki, *supra* note 11, at 544. The procedure of computing likelihood of paternity is currently practiced by national blood typing facilities in Oslo, Copenhagen, and Stockholm; great expertise has developed over several decades. UNIFORM PARENTAGE ACT § 12, Comment.

[85]*See* UNIFORM PARENTAGE ACT § 12, Comment; Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 10-11 (1974).

[86]UNIFORM PARENTAGE ACT § 12, Comment.

[87]*See* note 79 *supra*.

[88]Terasaki, *supra* note 11, at 549.

[89]*Id.*

[90]*Id.*

general population.[91] The "blood group paternity index,"[92] by which the "*probability of paternity* for the putative father" is estimated, is equivalent to "the ratio of his probability to the sum of the probabilities for both men,"[93] both the putative father and the random hypothetical man.

Because HLA probability statistics are founded on objective empirically established data, they provide precise, reliable, mathematical conclusions and are not prone to the defects inherent in the type of mathematical probability used in the famous case of *People v. Collins*.[94] In *Collins*, the expert witness did not present "any statistical evidence whatsoever in support of the probabilities for the factors selected";[95] because the validity of the estimates had not been demonstrated, the mathematical probability statistics were not admissible as evidence to identify a defendant.[96]

The HLA interpretations are not based on arbitrarily assigned probability values, as in *Collins*, or on a statistical theory unsupported by the evidence. Instead, they are based on objectively ascertainable data capable of being reproduced and a statistical theory founded on extensive scientific research and experimentation. When a scientific

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[91]*Id.* The following articles provide a detailed, scientific coverage of how to calculate these probabilities: *AMA-ABA Guidelines*, *supra* note 11, at 262; Lee, *supra* note 11, at 630-33. *Accord*, UNIFORM PARENTAGE ACT § 12, Comment.

[92]UNIFORM PARENTAGE ACT § 12, Comment at 604.

[93]Terasaki, *supra* note 11, at 549. Terasaki modifies this premise even further:

> This paternity probability is a measure of likelihood based solely on serologic information *apart from any nongenetic evidence for or against paternity.* It should be noted that such analysis is not meaningful in distinguishing between two *related*, nonexcluded putative fathers. The most extreme example is identical twins, for whom all genetic markers are the same.

Id.

[94]68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). In this case, a mathematician was asked to testify as to the probability that a couple other than the defendants (man and woman with special characteristics) could be the culprits in the charged robbery. He testified that the probability was astronomically small (1/12,000,000). The Supreme Court of California held that, although there was a proper role for probabilistic evidence in the trial process, the evidence in the particular case was unduly prejudicial because of the invalidity of the evidentiary foundation upon which the probabilities were based. *Id.* at 327-29, 438 P.2d at 38-39, 66 Cal. Rptr. at 502-03. The *Collins* court concluded that this "trial by mathematics" so distorted the jury's role and so disadvantaged defense counsel as to constitute a miscarriage of justice. *Id.* at 332, 438 P.2d at 41, 66 Cal. Rptr. at 505.

For a more extensive analysis of the *Collins* case, see Cullison, *Identification by Probabilities and Trial by Arithmetic (A Lesson for Beginners in How to be Wrong with Greater Precision)*, 6 HOUS. L. REV. 471, 475-77 (1969); Jaffee, *supra* note 29, at 471-75; Liddle, *supra* note 76, at 264-65, 270-73; Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1334-38 (1971).

[95]People v. Collins, 68 Cal. 2d at 325, 438 P.2d at 36, 66 Cal. Rptr. at 500.

[96]*Id.* at 327-29, 438 P.2d at 38-39, 66 Cal. Rptr. at 502-03.

technique "is susceptible to subsequent verification, sophisticated devices are available for measuring or counting the frequency of occurrence of that event, and reliable probabilities may be empirically assigned by experts" in the area.[97] Requiring two or more laboratory determinations of the estimation of paternity would be an effective safeguard against possible errors and misapplication of the test results.

The general acceptance of HLA tissue typing by the relevant scientific community,[98] the clinical importance of HLA testing in the area of organ transplantation,[99] and the availability of probability statistics which can be subsequently and independently empirically verified[100] all point to the validity of such tests in establishing paternity.

IV. Arguments Favoring the Use of HLA Tests as Affirmative Evidence of Paternity

The introduction of HLA tissue typing has caused a revolution in paternity testing; extensive scientific experimentation has led to the discovery of a greater number of genetic markers and an increasing number of blood group systems. Currently, between fifty-seven and sixty-two tests of blood and other genetic products are capable of establishing within approximately a ninety-nine percent probability whether a named man is the father of a certain child.[101]

However, use of estimations based on HLA typing, like use of other scientific evidence, requires striking a balance between the probative worth of the evidence and its capacity to confuse or prejudice a jury. This function is even more essential in an era when scientific proof "assume[s] a posture of mystic infallibility in the eyes of a jury."[102] Proponents of the admission of nonexclusion test results argue that the new tests provide such a high degree of prob-

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[97]Liddle, *supra* note 76, at 274.

[98]*See* note 79 *supra*.

[99]*See* note 83 *supra*.

[100]*See AMA-ABA Guidelines*, *supra* note 11, at 262; Lee, *supra* note 11, at 630-33; Terasaki, *supra* note 11, at 549.

[101]*See* Lee, *supra* note 11, at 616, 628; Shaw & Kass, *supra* note 5, at 58-59. Dr. Lee explains that the white blood cell isoantigen (HLA) system alone provides a 76% chance of exclusion. Lee, *supra* note 11, at 628. If, in addition to HLA tests, tests on red blood cells, serum proteins, and all other known systems are included, the cumulative chance of exclusion for the nonfather is approximately 99%. *Id.* Although it is currently not practical to utilize all of these tests, many laboratories are now capable of routinely performing tests which establish at least a 70% chance of exclusion. *Id. See also AMA-ABA Guidelines*, *supra* note 11, at 252-56, 276; Terasaki, *supra* note 11, at 554.

[102]United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974).

ability that they outweigh any negative factors they may possess.[103] Although the tests do not provide a 100% certainty of paternity, the results should be admitted as *substantial probative evidence* with the expert who presents the information subject to cross-examination.[104] These measures of probability, properly and cautiously applied, could give a jury a scientific basis for the determination of paternity. "[I]n contrast to the subjective evidence upon which paternity is now often determined, tests such as HLA typing which generally provide high probabilities of paternity should certainly be preferred by the courts."[105]

The evidentiary value of these estimations increases as the percentage of probability approaches near certainty. "A particularly high statement of probability or improbability will have as much if not more probative force than a mere indication of probability or even medical certainty."[106] Probability statements that are neither very high nor very low, such as the probabilities established by the conventional red blood cell groupings, have only slight probative worth which is far outweighed by the chance that a juror would be unduly impressed by scientific evidence that he is incapable of fully understanding or evaluating.[107] Even though nonexclusionary test results based solely on the standard red blood cell systems are logically relevant evidence on the issue of paternity, most courts have excluded the test results because of their highly prejudicial effect on the putative father.[108] Likewise, the probative value of such evidence may be outweighed by the counterbalancing factors of jury

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[103]*See* Krause, *supra* note 5, at 261-63; Lee, *supra* note 11, at 630; Salisbury, *supra* note 48, at 66-67, 73-74; Shaw & Kass, *supra* note 5, at 42-43, 60; Sterlek & Jacobson, *supra* note 79 at 526-29; Terasaki, *supra* note 11, at 554.

[104]Shaw & Kass, *supra* note 5, at 60.

[105]Terasaki, *supra* note 11, at 554. *See AMA-ABA Guidelines*, *supra* note 11, at 283. The joint committee recognized the evidentiary value of probability estimations and recommended that new uniform legislation be enacted to "simplify the admissibility in evidence of test results and the probative effect thereof, including the evidentiary value of estimations of 'likelihood of paternity.'" *Id. See also* Krause, *supra* note 5, at 271-72. The author comments that the practice of comparing the resemblance of the child to the putative father had a very prejudicial effect on the jury; the jury gave considerable weight to such a comparison. *Id.* at 272.

[106]Broun & Kelly, *Playing the Percentages and the Law of Evidence*, 1970 U. ILL. L.F. 23, 36.

[107]*Id.* at 36-38; Salisbury, *supra* note 48, at 66.

[108]Dodd v. Henkel, 84 Cal. App. 3d 604, 148 Cal. Rptr. 780 (1978); People v. Nichols, 341 Mich. 311, 67 N.W.2d 230 (1954); State *ex rel.* Freeman v. Morris, 156 Ohio St. 333, 102 N.E.2d 450 (1951). *Contra*, Livermore v. Livermore, 233 Iowa 1155, 11 N.W.2d 389 (1943). Note that these cases deal only with the impact of the traditional red blood cell systems on the probability of paternity. *See also* cases collected in Annot., 46 A.L.R.2d 1000, 1022 (1956).

confusion and undue prejudice when the group of potential fathers is relatively large.[109]

Scientific breakthroughs in the identification and classification of blood factors have permitted a significant narrowing of the class of potential fathers by blood type; therefore, estimation of paternity based on HLA testing has attained such accuracy[110] that, arguably, probability calculations are of sufficient import to be brought to the attention of the jury despite the risk that they will be accorded too much weight. Dean McCormick points out, "The question is one of identity. Every identifying mark of the father, however common the trait, (so long as not universal) such as height, weight, color of hair, is relevant, and it is from the accumulation of identifying traits that circumstantial proof of identity gains its persuasive power."[111] The statistical probability that a named man is the father of a certain child should be considered together with other types of traditional circumstantial evidence; proof that the putative father belongs to the small group of potential fathers would be substantial corroborative proof that he was the actual father. Shaw and Kass[112] best summarize the highly probative worth and evidentiary value that HLA blood typing tests have on the resolution of paternity:

> If one man has been identified by the mother as the father, if there is reasonable corroborating evidence, and if science can say that only one man in a hundred of the population at large could be the father of the child in question and that the alleged father has the characteristics of that man, it is highly probable that a jury would find the preponderance of evidence required in civil cases.[113]

They go on to observe:

> [Juries] *should* be swayed by testimony that there is a 99 percent probability of paternity. All evidence is intended to sway a jury one way or another, and certainly scientific data of the kind presented in this paper should weigh more heavily than testimony from the memory of a neighbor. Conversely, to withhold such information from a jury is to deprive it of crucial and material facts without which the picture of truth must be incomplete. Admission of high probability non-

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[109]Phillips v. Jackson, 615 P.2d 1228 (Utah 1980); Broun & Kelly, *supra* note 106 at 37.

[110]*See* note 11 *supra*.

[111]C. McCORMICK, *supra* note 17, § 211 at 522.

[112]Shaw & Kass, *supra* note 5, at 41.

[113]*Id.* at 42-43. *See also* Collins v. Wise, 156 Ind. App. 424, 296 N.E.2d 887 (1973) in which the court determined that civil actions to establish paternity "need only be proved by a preponderance of the evidence." *Id.* at 426, 296 N.E.2d at 889.

> exclusion evidence will surely benefit illegitimate children and falsely accused men as well as the tax-paying public.[114]

These recent scientific breakthroughs in blood and tissue group identification and classification signal revisions in the rules of evidence in paternity proceedings. Demands upon the accuracy and efficiency of the fact-finding process are increasing with the rapid development of novel scientific techniques. Several medical and legal authorities strongly recommend that blood and tissue typing results should be admissible as evidence even though an exclusion is not established.[115] The results "should be entitled to whatever weight the fact that an exclusion was not established in a particular case should have—and that weight should be computed by an expert in terms of statistical probabilities."[116] If only a small percentage, for example five percent or less, of a random sample of men are not excluded as possible fathers, then the fact that the putative father is not excluded by the test results is of considerable significance, especially if other circumstantial evidence indicates the possibility that he fathered the child.[117]

Accordingly, blood and tissue typing results estimating probability of parentage should be given the same weight as other types of circumstantial evidence; in most cases, the cumulative effect of this proof can establish with near 100% certainty that a named man is the father. As Professor Liddle points out, mathematical probability is most useful in "identifying certain individuals . . . by showing the correlation between or similarity of certain physiological, *genetic*, psychic, or other characteristics of the individual and certain like characteristics known to . . . have been related to the event in question."[118] In view of the recent scientific progress in paternity testing, courts should reassess their stand on the admission of statistical evidence to prove the likelihood of paternity. Certainly, its use in paternity proceedings will greatly enhance the accuracy and efficacy of the fact-finding process.

Recent improvements in blood and tissue group testing might also have an important impact on another aspect of paternity litigation. In addition to their use in the courtroom, HLA test results could be effectively used as a settlement tool to avoid paternity litigation altogether.[119] If the HLA test result gave a ninety-eight or ninety-nine percent assurance that the defendant was the father,

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[114]Shaw & Kass, *supra* note 5, at 60.

[115]*See* note 79 *supra*.

[116]Krause, *supra* note 5, at 261.

[117]*Id.*; Sterlek & Jacobson, *supra* note 79, at 526.

[118]Liddle, *supra* note 76, at 277 (emphasis added).

[119]*See* County of Fresno v. Williams, 92 Cal. App. 3d 133, 136-37, 154 Cal. Rptr. 660, 662 (1979).

and if other circumstantial evidence pointed to the defendant's paternity, a putative father would probably be persuaded to avoid litigation and seek a compromise settlement. Arguably, use of the HLA system would have the effect of decreasing the number of paternity suits while still imposing upon the father the obligation of supporting his child.

V. Arguments Opposing the Use of HLA Tests as Affirmative Evidence of Paternity

A. Countervailing Factors

Opponents of HLA tests as positive proof of paternity argue that the probative value of the evidence is substantially outweighed by a number of countervailing factors such as its misleading effect on the jury, unfair prejudice to the putative father, and an undue burden on the court system.[120] Additionally, opponents allege a high error rate and a paucity of qualified experts. The possible dangers cited are in large part the same ones considered in admitting mathematical scientific evidence in general.[121]

1. Misleading Effect on the Jury.—The first risk in allowing expert testimony based on complex scientific or mathematical evidence is the danger that the jury will give unmerited weight and effect to such evidence.[122] Because of the highly technical nature of most mathematical or scientific proof, the jury—and at times the judge and counsel—often has difficulty in analyzing the evidence correctly and combining it intelligently with the remaining evidence.[123] The impressiveness of statistics and the infallibility normally associated with objective scientific proof tempt the jury to assign such evidence disproportionate weight; additionally, the jury may be unable to logically assess the relevance and value of the testimony.[124] In *People v. Collins*,[125] the California Supreme Court warned that "[m]athematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not [be allowed to] cast a spell over him."[126] Professor Tribe warns,

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[120]Jaffee, *supra* note 29, at 468-85; Wiener & Socha, *Methods Available for Solving Medicolegal Problems of Disputed Parentage*, 21 J. For. Sci. 42, 61, 63 (1975). *See also* Tribe, *supra* note 94, at 1329-78.

[121]For a review of the most common counterbalancing factors which preclude the application of scientifically competent evidence, see text accompanying notes 51-57 *supra*.

[122]*See* Ellman & Kaye, *supra* note 57, at 1143-58; Tribe, *supra* note 94, at 1329-78.

[123]Tribe, *supra* note 94, at 1332-38.

[124]*Id.*

[125]68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968).

[126]*Id.* at 320, 438 P.2d at 33, 66 Cal. Rptr. at 497.

however, that scientific evidence should not be eliminated completely from the legal process; "the drawing of unwarranted inferences from expert testimony has long been viewed as rectifiable by cross-examination, coupled with the opportunity to rebut."[127] A trier of fact should not be deprived of the value of scientific data merely because it is highly technical and complicated.[128]

2. Unfair Prejudice to the Defendant.—Also inherent in the application of scientific and mathematical principles to the legal system is the danger that the jury will arrive at a premature conclusion about the defendant's guilt.[129] In order to make an independent and more accurate assessment of the putative father's paternity, the trier of fact normally suspends judgment until it has heard and carefully weighed all arguments in favor of the defense.[130] Yet, use of HLA data as independent direct-examination evidence on the ultimate issue of paternity forces the trier of fact to arrive at an estimate of the likely truth near the trial's start, long before he has had the opportunity to consider other circumstantial evidence.[131] Although statistical data to prove paternity inclusion may be relevant, it must be considered in conjunction with nonscientific evidence which does not carry with it the same risks.[132] Arguably, the use of HLA results and probability statistics to the exclusion of the more conventional forms of evidence in a paternity action impedes the effective presentation of the putative father's defense. In such a case, the unfairness and prejudice to the defendant would substantially outweigh any probative value the scientific proof may have. Professor Jaffee proposes several safeguards for the employment of HLA test results at trial.[133] One appropriate safeguard he notes, is to de-emphasize the statistical basis by disclosing it at other stages of the trial, such as on redirect, cross-examination, or rebuttal:

> A jury can distinguish rebuttal rehabilitation from direct examination in a main case, and act accordingly. Having heard . . . a much-evidenced dispute move rather methodically *to a narrow focus on the credibility of plaintiff's expert*, a jury would be able to put the attendant evidence in the right logical place.[134]

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[127]Tribe, *supra* note 94, at 1338.

[128]*See* Ellman & Kaye, *supra* note 57, at 1161-62 (suggesting the use of simplified but thorough probability charts during trial to reduce the confusion which scientific data engenders).

[129]Tribe, *supra* note 94, at 1368-72.

[130]*Id.* at 1371.

[131]*Id.* at 1368-71. *See also* Jaffe, *supra* note 29, at 468-85.

[132]*See* C. McCormick, *supra* note 17, § 185 at 439 n.30.

[133]Jaffee, *supra* note 29, at 484-85.

[134]*Id.* at 485 (emphasis added).

Paternity test results can be "legally relevant" only if they are used to corroborate independent evidence, such as testimony that the defendant had sexual relations with the mother at the critical time.[135] In order to ensure that the trier of fact does not view the HLA results as conclusive evidence of paternity, the test results should be introduced as one of the many factors that formed the basis for the expert's opinion.[136] This evidence would, therefore, not be used as substantive evidence to prove the issue of paternity but merely as secondary evidence focusing upon the credibility of the expert's opinion.[137] Used in this way, HLA data would more closely approximate its proper function in the judicial process—as relevant evidence to be rationally analyzed by the trier of fact.

3. Undue Burden on the Court System.—Those opposing the admissibility of HLA test results also claim that this evidence places an undue burden on the court system. According to some authorities, the HLA testing procedure is "beset with numerous pitfalls,"[138] thereby reducing its utility to the courts:

> [F]ew laboratories if any are equipped to carry out all the necessary tests, and it is doubtful that any single individual is fully qualified to carry out and interpret all the tests. In addition, the high cost of a "complete" test makes it prohibitive and impractical. A more serious difficulty is the real possibility of mistakes, which increases in likelihood as the variety and number of test procedures increase, thus raising the danger of miscarriage of justice.[139]

A major criticism of the HLA testing procedure is that few laboratories are capable of performing the more than fifty tests required for a ninety-nine percent inclusion.[140] In response, the Joint AMA-ABA Committee proposed that steps be taken to identify and make a list of accredited facilities qualified to perform the full series of blood and tissue tests.[141] Placing qualified laboratories in centralized locations throughout the country, along with the creation of uniform procedures for identifying mailed specimens, would help to alleviate the shortage of laboratories competent to perform the tests.[142]

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[135]*Id.* at 480-81.

[136]*Id.* at 478-79.

[137]*Id.* at 468, 476, 478-79.

[138]Wiener & Socha, *supra* note 120, at 61.

[139]*Id.* at 63.

[140]*Id.* at 61, 63; Lee, *supra* note 11, at 628; Polesky & Krause, *Blood Typing in Disputed Paternity Cases—Capabilities of American Laboratories*, 10 FAM. L.Q. 287, 289-93 (1976).

[141]*AMA-ABA Guidelines*, *supra* note 11, at 283; Shaw & Kass, *supra* note 5, at 59.

[142]*AMA-ABA Guidelines*, *supra* note 11, at 280-83.

In addition, the cost of performing all of these tests makes their routine use in disputed paternity cases unrealistic.[143] Although the cost may vary, the entire battery of fifty-seven to sixty-two tests costs approximately $150 per person,[144] approximately five times the cost of the standard red blood cell grouping test.[145] If a state or county were required to assume the additional cost of the HLA tests in each case where a party claimed he was financially unable to bear this substantial expense, potential burden on the public purse would be extreme.[146] Arguably, the financial gains made by shifting the child support burden from welfare agencies to the responsible father could be offset by the burden placed on welfare agencies in subsidizing the considerable cost of these additional tests.

Although "employment of this entire battery of tests would require a magnitude of time, money and skill that would make it prohibitive in routine cases,"[147] in many instances the common blood tests would be sufficient.[148] The AMA-ABA report stated that it is not necessary to utilize the entire set of tests once an exclusion had definitely been reached.[149] The Guidelines recommended that testing proceed in stages, with the more general tests, ABO, Rh, and MNSs systems, first; if no exclusion is produced in the first round, three additional screenings, the Kell, Duffy, and Kidd systems, could then be performed.[150] The probability of excluding a man who is not the father ranges from sixty-three to seventy-two percent, depending on race, when these six systems are used.[151] "In the event no exclusion is produced at that stage, additional testing using the HLA system . . . may be done to raise the mean probability of exclusion to at least the ninety percent level."[152] Therefore, the full spectrum of tests should only be utilized in exceptional cases.

Some commentators point out that discretion and common sense should prevail in deciding whether the parties should be tested under the expensive HLA system:

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[143]Wiener & Socha, *supra* note 120, at 61.

[144]Shaw & Kass, *supra* note 5, at 58.

[145]Moore v. Astor, 102 Misc. 2d 472, 474, 423 N.Y.S.2d 1010, 1012 (Fam. Ct. 1980).

[146]*Id. See also* Commissioner of Social Servs. v. Lardeo, 100 Misc. 2d 220, 224, 417 N.Y.S.2d 665, 669 (Fam. Ct. 1979).

[147]Shaw & Kass, *supra* note 5, at 59.

[148]*Id.* at 60.

[149]*AMA-ABA Guidelines*, *supra* note 11, at 256.

[150]*Id.* For a good general discussion of the ABO, Rh, MNSs, Kell, Duffy, and Kidd blood group systems, see *id.* at 263-72.

[151]*Id.*

[152]*Id.*

> Common sense must be used. Lawyers should look at the entire fact situation with which they are faced, considering such evidence as length of gestation, access of the putative father to the mother, access of other men, and the character of the parties. Only if they are left with a sharp controversy should they turn to science with its fullest potential for approaching truth.[153]

Arguably, costly HLA testing need not be done if the other six systems show exclusion or if other factors independently establish strong proof of paternity or nonpaternity. Thus, criticisms that HLA testing is too expensive for routine use are largely undermined.

4. High Error Rate.—Opponents also allege that the HLA process has a high error rate and may result in misclassification. Commentators indicate that the HLA tests "are reputed to have the reproducibility of only about 90%, so that the possibility of errors is a real one indeed."[154] They also note that the introduction of complicated and sophisticated testing procedures increases the "possibility of errors."[155] Possible mistakes which are likely to endanger the accuracy of the tests are taking a sample from someone other than the person to be tested, incorrect storage practices, and use of the wrong antisera.[156] With the increase in the variety and number of testing procedures, the possibility of making such errors would also increase. It is strongly recommended that additional research and experimentation in paternity testing are needed "to improve the reliability and reproducibility of the existing tests."[157]

5. Scarcity of Qualified Experts.—There is also a problem in finding and training qualified experts to insure that all tests are carried out correctly and that the test results are properly interpreted.[158] The Utah Supreme Court in the recent case of *Phillips v. Jackson*[159] held that the trial court erred in admitting the results of the new HLA tests.[160] Although the court recognized the abundance of scientific literature lauding the validity of the tests and their widespread acceptance in medical circles,[161] it held that the expert witness failed to establish a proper foundation at trial for the admissibility of the test results. The court stated:

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[153]Shaw & Kass, *supra* note 5, at 59.

[154]Wiener & Socha, *supra* note 120, at 61.

[155]Shaw & Kass, *supra* note 5, at 57.

[156]*Id.* at 58.

[157]Lee, *supra* note 11, at 633.

[156]*Id.*; Shaw & Kass, *supra* note 5, at 57; Wiener & Socha, *supra* note 120, at 63.

[159]615 P.2d 1228 (Utah 1980) (3-2 decision).

[160]*Id.* at 1238.

[161]*Id.* at 1235-36.

> [T]he articles are not sufficient, absent expert testimony, for this Court to determine as a matter of law the issue of general admissibility, especially in view of the paucity of legal opinions on this point. The articles require expert interpretation and elaboration. It is not clear, for example, that they all define the HLA test in the same manner, or require that the same procedures be followed to achieve the degree of reliability claimed. . . . In short, there are numerous unanswered questions which should be addressed by expert testimony to lay the necessary foundation.[162]

The court further noted that the expert witness' testimony was "too general, too vague, and too unrelated to the specific requirements for establishing a foundation for the test . . . ."[163] The expert did not "indicate how the table of percentages used to establish paternity probabilities was [calculated]."[164] In addition, there was no evidence in the record to establish the witness' expertise either in the theory or in the special procedure. In fact, he had no technical background or training in the area, nor did he have a special familiarity with the scientific literature on the subject.[165] The general statement that the HLA method has achieved wide scientific acceptance is insufficient, without more, to lay the necessary foundation. Whether an adequate evidentiary foundation was established is a mixed question of law and fact.[166] Furthermore, the expert witness was unqualified to interpret the test results and to establish that the actual method employed in the particular case was performed in accordance with proper procedures and with proper materials and equipment.[167]

The scarcity of well-informed, qualified experts to testify both as to the validity of the HLA tests in general and to the correctness of the procedure in the particular case makes courts hesitant to admit the test results into evidence absent a specific showing as to their reliability and preciseness. Although HLA typing is considered "highly reliable when performed under carefully controlled conditions by laboratories that perform quality control checks,"[168] the insufficient number of qualified experts to carry out and interpret the tests weakens their validity and probative worth. Without a reserve of qualified experts available to expose the limitations of the HLA

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[162]*Id.* at 1236.

[163]*Id.*

[164]*Id.* at 1236-37.

[165]*Id.*

[166]*See* Cramer v. Morrison, 88 Cal. App. 3d 873, 887-88, 153 Cal. Rptr. 865, 873-74 (1979).

[167]Phillips v. Jackson, 615 P.2d at 1235-36.

[168]Terasaki, *supra* note 11, at 548.

technique in general and the flaws in the specific case, the tests may attain exaggerated importance in the fact-finding process.[169] In order to avoid these pitfalls and establish a valid evidentiary foundation, counsel should actively seek out qualified experts who can objectively criticize and point out the possible defects in the procedure, thereby exposing its shortcomings and enabling the trier of fact to more sensibly evaluate its relevance and probative worth.[170]

Another possible solution is the establishment of centralized, special institutes devoted solely to blood and tissue typing.[171] "Such central reference institutes could overcome the problem of training qualified experts, producing and standardizing antiserums and other reagents . . . ."[172] Presently, courts may be justified in their reluctance to admit results of HLA tissue typing tests because of the scarcity of competent facilities to perform the tests and the lack of qualified experts to interpret their results; the degree of preciseness of evidentiary foundations would vary considerably from jurisdiction to jurisdiction. With the advent of centralized, accredited laboratories, however, to train qualified experts, to standardize testing procedures, to develop acceptable laboratory quality control, and to improve the reliability and reproducibility of the tests, the courts should be less reluctant to admit the results as evidence of positive proof of paternity. The high evidentiary value given to the tests would be more justified as the accuracy of the tests increased; their probative worth would definitely outweigh any potential risks of jury confusion and undue burden on the court system.

VI. Judicial Reaction to HLA Testing

There have been no Indiana cases admitting evidence on the statistical likelihood of paternity.[173] Nor have the courts interpreted the extent of change occasioned by the amendment of Indiana Code section 31-6-6.1-8. However, several other jurisdictions have acknowledged the scientific community's acceptance of the HLA tests as accurate and reliable predictors of paternity and nonpaternity,[174] and a few courts have held such proof admissible as highly

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[169]United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974); People v. Kelly, 17 Cal. 3d 24, 30-32, 37-40, 549 P.2d 1240, 1244-45, 1248-50, 130 Cal. Rptr. 144, 148-49, 152-54 (1976).

[170]*See* notes 59 & 64 *supra* and accompanying text.

[171]*See* Wiener & Socha, *supra* note 120, at 63.

[172]*Id.*

[173]Recall that Indiana courts have only allowed blood test evidence to exclude a man from paternity. *See* note 19 *supra*.

[174]*E.g.*, Simons v. Jorg, 384 So. 2d 1362 (Fla. Dist. Ct. App. 1980); Commonwealth v. Blazo, 406 N.E.2d 1323 (Mass. Ct. App. 1980); Malvasi v. Malvasi, 167 N.J. Super.

probative evidence.[175] The courts often cite medical and legal journals which laud the HLA tests as an improved and dependable method for ascertaining paternity.[176] However, even the progressive courts recognize that new developments in paternity testing must have an adequate evidentiary foundation in order to be admitted as evidence.[177]

California is the pioneer state in utilizing all evidentiary aspects of HLA tissue typing. In the landmark case of *Cramer v. Morrison*,[178]

513, 514, 401 A.2d 279, 280 (1979). In Simons v. Jorg, 384 So. 2d 1362 (Fla. Dist. Ct. App. 1980), although it did not reach the question of the admissibility of HLA test results at trial nor decide the weight to be accorded such medical evidence at trial, the court upheld the trial court's decision that, based on the "undisputed" evidence of the test's reliability and accuracy, the party seeking to establish paternity showed sufficient good cause to require the putative father to submit to such a test. *Id.* at 1363. In Commonwealth v. Blazo, 406 N.E.2d 1323 (Mass. Ct. App. 1980), the appellate court upheld the trial court's refusal to order additional blood tests for the defendant, the mother, and the child since the refusal was founded on the inconclusive red blood cell groupings and since the HLA test had not been generally recognized and accepted at this time. In dicta, though, the court favored the use of HLA tests in the future:

> In view of the high level of accuracy, now attained from the HLA test and its recognition and general acceptance by the scientific and medical community since the date of this trial, in any contested paternity case arising hereafter when the putative father requests the HLA test, the judge should carefully consider in the exercise of his or her sound discretion ordering the administration of the HLA test to the defendant, the mother and the child.

Id. at 1326. *See also* Phillips v. Jackson, 615 P.2d 1228 (Utah 1980); Marticorena v. Miller, 597 P.2d 1349 (Utah 1979) (Maughan, J., dissenting) (Justice Maughan advocated a remand for a new trial on the paternity issue in view of the accuracy and highly probative nature of the new HLA tests which were unavailable to the parties at the time of the first trial).

[175]County of Fresno v. Williams, 92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (1979); Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Michael B. v. Amanda B., 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (1978); Carlyon v. Weeks, 387 So. 2d 465 (Fla. Dist. Ct. App. 1980); Malvasi v. Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979). *Contra*, Jane L. v. Rodney B., 103 Misc. 2d 9, 425 N.Y.S.2d 235 (Fam. Ct. 1980); Moore v. Astor, 102 Misc. 2d 472, 423 N.Y.S.2d 1010 (Fam. Ct. 1980); Goodrich v. Norman, 100 Misc. 2d 33, 421 N.Y.S.2d 285 (Fam. Ct. 1979); Commissioner of Social Servs. v. Lardeo, 100 Misc. 2d 220, 417 N.Y.S.2d 665 (Fam. Ct. 1975).

[176]*See* Cramer v. Morrison, 88 Cal. App. 3d at 887-88, 153 Cal. Rptr. at 874; Commissioner of Social Servs. v. Lardeo, 100 Misc. 2d at 220, 417 N.Y.S.2d at 666-67, 669. The *Cramer* court remanded the case for a factual determination as to whether the foundational requirements were met in the particular case. Although the numerous legal and scientific publications established the tests' validity and their general acceptance in the scientific community as a matter of law, a full determination of whether the foundational predicate was met also presented a question of fact to be ascertained from the testimony of qualified experts in the field. Cramer v. Morrison, 88 Cal. App. 3d at 886-89, 153 Cal. Rptr. at 873-74.

[177]Cramer v. Morrison, 88 Cal. App. 3d at 885-89, 153 Cal. Rptr. at 872-74; County of Fresno v. Williams, 92 Cal. App. 3d at 138, 154 Cal. Rptr. at 663; Carlyon v. Weeks, 387 So. 2d at 467-68; Malvasi v. Malvasi, 167 N.J. Super. at 515, 401 A.2d at 280.

[178]88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

the California Court of Appeals reversed the trial court's grant of the defendant's motion in limine and said that the results of HLA tests could be received as probative evidence showing likelihood of paternity.[179] The court held that it was irrelevant that the California legislature, when it adopted the Uniform Act on Blood Tests to Determine Paternity,[180] omitted part of section 4 which allows the admission in evidence of blood test results to show probability of paternity.[181] It interpreted the omission to refer not to the sophisticated HLA test but to the standard Landsteiner blood grouping tests which were in use when the Uniform Act was adopted in California.[182] The *Cramer* court was so convinced that the test results would enhance the accuracy and impartiality of the paternity suit that it independently admitted this scientific evidence since the statute failed to exclude *HLA* results as evidence of paternity.[183]

The crucial question, however, was whether the probative value of the evidence outweighed its prejudicial effect. The *Cramer* court allowed the use of HLA tests to determine probability only after a deliberate balancing of the probative worth of such evidence and the dangers of unfair prejudice to the other party.[184] The court noted that the plaintiff most likely would have established the requisite evidentiary foundation for the admissibility of the HLA test had the motion in limine not been erroneously granted.[185]

In order to demonstrate the validity of the HLA test as a reliable indicator of paternity and its acceptance by the scientific community, the plaintiff called Dr. Paul Terasaki as an expert witness and also introduced various medical and legal journals to document the general acceptance of the test.[186] As a leading expert in the United States in the field of tissue typing and blood testing, Dr. Terasaki was well-qualified to testify concerning both the reliability of the HLA test as an indicator of paternity and its general acceptance in the scientific world.[187] Additionally, because Dr. Terasaki performed the HLA test on blood samples taken from the mother, the child, and the defendant,[188] he was well-qualified to

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[179]*Id.* at 880, 884-89, 153 Cal. Rptr. at 868, 871-74.

[180]*See* note 38 *supra.*

[181]88 Cal. App. 3d at 880-83, 153 Cal. Rptr. at 868-71.

[182]*Id.*

[183]*Id.*

[184]*Id.* at 884-85, 153 Cal. Rptr. at 872.

[185]*Id.* at 888-89, 153 Cal. Rptr. at 874.

[186]*Id.* at 885-88, 153 Cal. Rptr. at 872-74.

[187]*Id.* at 877-78, 886-88, & n.19, 153 Cal. Rptr. at 867, 873-74 & n.19.

[188]*Id.* at 877, 153 Cal. Rptr. at 867.

demonstrate that proper procedures were used.[189]

The court of appeals, also held that the defendant was precluded from attacking the foundational predicate of the HLA test because the defendant specifically indicated to the trial court that he did not base his motion in limine on the ground that the test had not attained general acceptance in the scientific community.[190] Not only was the *Cramer* court convinced of the existence of valid scientific bases for the HLA data, but it was also convinced that the highly relevant and probative worth of the evidence outweighed the dangers inherent in its introduction.[191]

The court found that such readily obtainable genetic evidence could provide a more precise and objective basis for ascertaining paternity than could the "flimsy" subjective evidence by which paternity has been determined in the past.[192] The *Cramer* court reasoned that the dramatic increase in the accuracy with which probabilities can be determined requires the use of HLA test results in order to enhance the empirical qualities of paternity proceedings.[193] The court concluded, "'[t]he more substantial the probative value of relevant evidence, the greater must be the danger of prejudice to an adverse party, in order to justify a finding that the probative value is substantially outweighed by the danger of undue prejudice.'"[194]

The *Cramer* court's reasoning can be extended a step further. Because HLA tests combined with the conventional red blood cell groupings can establish inclusion with 95% accuracy, they are the best available scientific evidence on the issue of paternity. A man not definitely excluded after complete testing will undoubtedly be the actual father, given other credible testimony that he had a relationship with the natural mother.[195] Excluding such competent scientific evidence on the paternity issue would greatly undermine the integrity of the legal process and would perpetuate the uncertainties of fatherhood which still exist despite a judicial finding of paternity or nonpaternity.[196]

The California Court of Appeals in *County of Fresno v. Superior*

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[189]*See* People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

[190]88 Cal. App. 3d at 887-88, 153 Cal. Rptr. at 873-74.

[191]*Id.* at 884-85, 153 Cal. Rptr. at 872.

[192]*Id.* at 885, 153 Cal. Rptr. at 872.

[193]*Id.* In *Cramer*, Dr. Terasaki determined that there was a 98.3% probability that defendant was the father. *Id.*

[194]88 Cal. App. 3d at 884-85, 153 Cal. Rptr. at 872 (citing Jefferson, *California Evidence Benchbook* § 22.1 at 289 (1972)).

[195]*See* Jane L. v. Rodney B., 103 Misc. 2d 9, 10, 425 N.Y.S.2d 235, 236 (Fam. Ct. 1980).

[196]*See generally* note 174 *supra* and accompanying text.

Court[197] indicated that "public policy favors the use of objective highly accurate scientific analysis."[198] The court reasoned that a more sophisticated and exact test aids the court in "the difficult search for the truth";[199] to the extent that it "contributes to the resolution of the paternity issue, it may reduce the embarrassment of usual discovery procedures concerning conception."[200]

The same court in *Michael B. v. Superior Court*[201] advocated the admissibility of the HLA test as affirmative evidence:

> Even when the test does not exclude a defendant from being the possible father, it could be a significant factor to be considered by the parties in facilitating resolution of cases, particularly where there is limited evidence on the paternity issue and the particular test is helpful in determining statistical probabilities of paternity.[202]

The traditional policies of preserving the family and reducing doubts about parentage still continue to control.[203] As the California Supreme Court stated in *Salas v. Cortez*,[204] "[T]he state owes it to the child to ensure that an accurate determination of parentage will be made."[205] Considering the interests at stake, the question of paternity should be dealt with empirically by use of available genetic data.

Two recent cases have, however, questioned the propriety of admitting HLA test results to establish paternity, thereby demonstrating the judiciary's hesitation to revise the conventional rules of evidence to conform with modern scientific advances in the absence of specific legislative authorization or adequate safeguards. In *J.B. v. A.F.*[206] the Wisconsin Court of Appeals held that although "HLA testing has dramatically increased the accuracy with which probabilities can be determined,"[207] HLA test results could not be admissible as evidence to establish paternity under present Wisconsin law. The court reasoned that such an authorization would in effect "work an amendment"[208] because the Wisconsin paternity statute specifically

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[197]92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (1979).
[198]*Id.* at 138, 154 Cal. Rptr at 663.
[199]*Id.*
[200]*Id.*
[201]86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (1978).
[202]*Id.* at 1009-10, 150 Cal. Rptr. at 588.
[203]*See* Cramer v. Morrison, 88 Cal. App. 3d at 885, 153 Cal. Rptr. at 872.
[204]24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979).
[205]*Id.* at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537.
[206]92 Wis. 2d 696, 285 N.W.2d 880 (Wis. Ct App. 1979).
[207]*Id.* at 703, 285 N.W.2d at 883.
[208]*Id.* at 705, 285 N.W.2d at 884.

allowed blood test results as evidence "only in cases where definite exclusion of any person [was] established."[209] The court interpreted the term "blood tests" to include both the standard red blood cell groups and also the new HLA tests and was reluctant to incorporate new scientific developments into the legal process, waiting instead for specific legislative approval.

In *Phillips v. Jackson*,[210] the Supreme Court of Utah held that HLA test results were inadmissible as evidence proving paternity,[211] although the Utah statute allowed the affirmative use of blood tests, subject to the court's discretion.[212] The Utah Supreme Court, exercising its discretion, concluded that an adequate foundation regarding the accuracy and reliability of the tests had not been laid. Although the court was aware of various scientific and medical journals commending the validity of the HLA tests, it restrictively held that the tests fell below the legal standards required for the admissibility of scientific evidence.[213] The court maintained that the expert witness was not qualified to elucidate the scientific literature on the subject or to interpret the actual test results.[214] The record did not establish the witness' expertise either in the theory or in the special procedure. Even with this favorable state statute, the *Phillips* court was cautious in integrating recent scientific developments into the factual determination of the paternity issue as long as there was even the slightest question regarding their accuracy and evidentiary value.

VII. Conclusion

With the present increase in the importance of paternity litigation, the need for accurate, reliable paternity tests will also in-

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[209]Wis. Stat. § 885.23 (1966). However, since the case of J.B. v. A.F., 92 Wis. 2d 696, 285 N.W.2d 880 (Wis. Ct. App. 1979), this statute has been amended (effective July 1, 1981) to allow blood test results to "be receivable as evidence in any case where exclusion from parentage is established *or where a probability of parentage is shown to exist.*" Wis. Stat. § 885.23 (West Supp. 1980-1981) (emphasis added). The Wisconsin legislature, in enacting this amendment, apparently considered the dicta in *J.B. v. A.F.* favoring revision of the rules of evidence to include statistical estimates of the likelihood of paternity. It will be interesting to observe how the Wisconsin courts will apply this amendment, for it is as vague as the Indiana one in establishing specific guidelines for the courts.

[210]615 P.2d 1228 (Utah 1980).

[211]*Id.* at 1238.

[212]Utah Code Ann. § 78-45a-10 (1977). Section 10 provides in part: "If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type." *Id.*

[213]615 P.2d at 1235-38.

[214]*Id. See also* text accompanying notes 158-67 *supra.*

crease. The validity of HLA tissue typing as an effective means of establishing paternity exclusion and inclusion with a high degree of conclusiveness is being more widely accepted in both medical and legal circles, and appropriate revisions in the law of evidence will no doubt be made as the courts become more willing to admit probabilistic proof of paternity.

With the greater use of complex scientific evidence in the legal process, however, safeguards need to be developed in order for such technical data to be properly interpreted and applied in the courtroom. The medical and legal professions must work together so that sophisticated scientific information can be responsibly and intelligently used in the courts.[215] Statistical data estimating the likelihood of paternity is so highly probative on the crucial issue of paternity that it would be unfair to totally prohibit its use because of the risk that the jury will misconstrue its worth and give it unmerited weight. Cautionary jury instructions should be devised to warn the jurors that probabilistic data should not be the sole deciding factor on the issue of paternity; it should be used to corroborate other, more conventional forms of circumstantial evidence. Application of scientific proof should also be restricted to cross-examination and rebuttal in order to prevent premature conclusions before the rest of the evidence has been presented. If, in addition to these safeguards, advance notice is given to the adversary of the intent to use HLA tests as proof, and if "some provision for publicly financed expert assistance to the indigent accused confronted with an expert adversary"[216] is made, there will be little if any prejudice to the putative father. No undue burden on the judicial system will result by admitting these highly probative and reliable HLA test results as affirmative evidence of paternity.

FRANCINE PROTOGERE

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[215]Krause, *supra* note 5, at 281.

[216]Tribe, *supra* note 94, at 1338.

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